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No. (1)

IN THE

Supreme Court of the United States

RONALD MIKOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE QUESTIONS PRESENTED

Questions Concerning The Determination Of Guilt

1. Does the test used below to determine whether the government has violated a defendant's Fifth Amendment right against self-incrimination by commenting on the defendant's silence impermissibly diminish that right by focusing solely on the intent of the prosecutor, which is irrelevant to the impact the comment has upon the jury?

2. Under 18 U.S.C. § 3599(f) or the Due Process Clause, does a district court have a heightened obligation in a capital case to ensure that an indigent capital defendant's appointed counsel has the assistance of an expert with the particular expertise that counsel reasonably has requested and needs to defend the case?

Question Concerning Imposing The Death Sentence

3. In the sentencing hearing of a capital case, does the Fifth Amendment prohibit the government from using a defendant's exercise of his right to remain silent to establish the aggravating factor of lack of remorse?

PARTIES TO THE PROCEEDING

The petitioner is Ronald Mikos, the defendant and appellant below. The respondent is the United States, the plaintiff and appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Dr. Ronald Mikos respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

This Petition seeks the review of the decision of the Seventh Circuit in *United States v. Mikos*, reprinted at Pet. App. A and published at 539 F.3d 706 (7th Cir. 2008). In an opinion by Chief Judge Frank H. Easterbrook, the court of appeals affirmed Mikos's conviction and sentence of death (with Judge Richard Posner dissenting as to the death sentence), imposed by the United States District Court for the Northern District of Illinois after a jury trial. The Seventh Circuit's order denying rehearing and rehearing en banc is reprinted at Pet. App. C and is not otherwise published.

JURISDICTION

The Seventh Circuit entered judgment on August 25, 2008, and denied Mikos's petition for rehearing and rehearing en banc on November 17, 2008. (Pet. App. A; Pet. App. C.) On January 23, 2009, Justice Stevens granted an extension of time to file this petition, to and including April 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution and the pertinent provisions of Sections 3599 and 3006A of Title 18 of the United States Code are reprinted in the appendix to this petition at Pet. App. D.

STATEMENT OF THE CASE

Podiatrist Ronald Mikos was convicted of murdering Joyce Brannon with a .22-caliber revolver in her Chicago apartment on January 27, 2002. The government argued that Mikos murdered Ms. Brannon to prevent her from testifying before a grand jury that was investigating Mikos for Medicare fraud.

The evidence linking Mikos to Brannon's murder was entirely circumstantial. Despite evidence of a home invasion (8Tr1745; 9Tr1860-63; 9Tr1896-98), the investigation focused on a grand jury subpoena the Chicago police found in Brannon's apartment (8Tr1780-81).[1] The subpoena required Brannon to appear four days later to testify against Mikos, her former podiatrist, whom the government was investigating for Medicare fraud, allegedly by billing for procedures not performed. (5Tr1098; 8Tr1779.) Evidence at trial showed that, during the 1990s, Mikos billed Medicare for numerous

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[1] Citations to R__ are citations to the district court record. Citations to __Tr____ are citations to the designated volume and page number of the trial transcript. Citations to Pet. App. __ are to the appendices filed with this brief.

procedures on many of his patients, nine of whom had told Mikos that they would testify against him and, in fact, did testify against him before the grand jury. (5Tr1174-81; 6Tr1254-72; 6Tr1332; 6Tr1399; 6Tr1409; 6Tr1415; 7Tr1530; 7Tr1543.)

Shortly after Brannon's murder, the Chicago police and the FBI focused on Mikos as the murder suspect. The FBI learned that on January 24, 2002, the Skokie Police Department returned to Mikos firearms it had confiscated on January 6, 2002 because his Firearm Owner's Identification ("FOID") card had expired. (8Tr1627-28; 8Tr1663-67.) One of those firearms was a .22-caliber blue steel Hawes/Herbert Schmidt Model 21 revolver. (8Tr1667.) Mikos promptly acquired a valid FOID card and retrieved his property. (8Tr1628; 8Tr1661-62.) On February 4, 2002, the government obtained a "sneak-and-peek" search warrant for a storage locker Mikos rented. (R74, Ex. 1.) The government found all of the firearms that had been returned to Mikos except the Model 21 revolver. (8Tr1642; 12Tr2451-52.)

Before trial, Mikos sought funds to retain Massachusetts ballistics and toolmarks analysis expert David LaMagna. (R78.) Mikos requested LaMagna after learning the government intended to offer evidence comparing the bullets recovered from Brannon to the type of gun (the Model 21 revolver) the government contended had gone missing since the murder. (*Id.* at 2.) The Federal Death Penalty Resource Counsel Program had recommended LaMagna in light of his specific expertise in ballistics and toolmarks analysis. (*Id.* at 2-3.) In particular,

LaMagna had substantial experience analyzing the FBI's work on ballistics and toolmarks issues and thus was particularly suited for challenging the government's experts and preparing counsel to conduct cross-examination. (*Id.* at 3-4.) Mikos's motion stated that his counsel had attempted to locate experts locally but had concluded "there is no one locally with Mr. LaMagna's knowledge, experience, and qualifications on these subjects." (*Id.* at 4.)

The district court denied Mikos's motion. As sole grounds for the denial, the court stated that "[t]he motion contains no explanation as to the need for an out-of-town expert in the area of ballistics and tool mark identification" and advised counsel to seek a local expert. (Pet. App. B, 41a.) After the court's ruling, Mikos's counsel again searched for a local person with the appropriate expertise and, finding none, resorted to the services of a local consultant who had only general experience with ballistics. (R283, Ex. 1.) This general experience provided little assistance to Mikos's counsel in mounting a pretrial challenge to the admissibility of testimony from the government's ballistics expert, Paul Tangren. Although the local expert provided an affidavit to support Mikos's motion to exclude, the district court rejected that affidavit as "not very convincing." (*Id.*; R310 at 3.) At trial, Mikos decided not to call the local expert in his defense, because he simply did not have expertise in the key areas that LaMagna had. (10Tr2118.)

Although the court denied Mikos his ballistics expert from Boston, the government flew in from the

East Coast three trial experts concerning ballistics and other issues relating to the gun. (10Tr2033; 11Tr2252-53; 11Tr2261-62.) One of those experts, FBI agent Paul Tangren (10Tr2033), testified as to a purported link between the missing gun and the bullets recovered from the murder scene. He testified that the six bullets used in the murder were .22-caliber long-rifle bullets (10Tr2047-48), at least four of which had been fired from the same revolver's barrel. (10Tr2051-52.) Among other characteristics, there were eight "grooves" (impressions from the grooves in the gun barrel (10Tr2071-93)) on each bullet. (10Tr2090.) Tangren compared the bullets to the data in the FBI's General Rifling Characteristics ("GRC") database, a computerized compilation of data on characteristics of firearms the FBI has worked with over the years. (10Tr2091-92.) Purporting to rely on this database, Tangren specifically selected the wrong model of .22-caliber gun to test-fire: although his test-fired bullets matched the eight grooves present on the bullets from the crime scene, Mikos's .22 Hawes revolver was a Model 21. (10Tr2127; 11Tr 2184.) The FBI's GRC database included data for four Model 21s, and every Model 21 had only six grooves, not eight grooves. (11Tr 2187-90.)

Relying on Tangren's inherently unreliable testimony, the government made Mikos's "missing gun" its theme at trial. Emphasizing the "missing gun" in his opening statement, the prosecutor told the jury that the FBI had found all the guns returned to Mikos except "a 22 caliber Herbert Schmidt revolver, the gun he used to kill Joyce

Brannon." (5Tr1053.) Then he said: "the only possible explanation for this gun being missing is because he doesn't want it b[r]ought in here." (Pet. App. F, 63a.) The court overruled Mikos's objection. (*Id.*)

The government continued the theme at closing and rebuttal: "Where is that gun? Why is that gun not there. There is only one reasonable explanation. There were many unreasonable explanations, but one reasonable explanation, which is the only thing we're here about. It's gone because he wants it gone." (Pet. App. G, 68a.) Further, the prosecutor stated, "the defendant[] does not have to tell you where that gun is. He doesn't have to say a word. He does not have to tell you where that gun is. But this is not a game of hide-and-go-seek. And he had [a] two-day headstart on this agent." (*Id.* at 66a.)

Mikos exercised his Fifth Amendment right not to testify during both his trial and sentencing proceedings. In the sentencing phase, the government commented on Mikos's silence to argue that he had shown no remorse: "He's sitting 20 feet away from you and there's nothing, no remorse whatsoever, because he thinks he got away with it." (Pet. App. H, 71a.) Yet nothing on record suggests that Mikos conducted himself in anything other than an appropriate manner throughout the proceedings. Continuing, the prosecutor used Mikos's silence to show supposed lack of remorse: "[H]e's sorry he got caught, but he's not sorry that he shot Joyce Brannon. The only ramification of that as he's sitting opposite you right now, nothing else in this man's

heart, not a single thing. . . . He has no remorse for what he did." (*Id.* at 72a-73a.)

On May 5, 2005, the jury found Mikos guilty on all counts. (Pet. App. E, 50a-51a; R359.) On May 23, 2005, the jury imposed the death penalty. (R376.) In doing so, the jury found lack of remorse as an aggravating factor justifying a death sentence. (*Id.*); *Mikos*, 539 F.3d at 716-18 (Pet. App. A, 20a-25a). While not the only aggravator, the prosecutor spent more time addressing the lack of remorse factor in summation than any other aggravator; it also was the last aggravator he discussed. (*See* Pet. App. H, 71a-74a; 23Tr3727-28.)

On August 25, 2008, the Seventh Circuit affirmed the lower court's entry of judgment of conviction of murder, and a majority affirmed the imposition of the death sentence. As to the death sentence, the majority specifically approved the use of Mikos's decision not to testify to demonstrate the lack of remorse aggravator: "If it is proper to take confessions, guilty pleas, and vows to improve one's life into account when deciding whether a murderer should be put to death . . . then it must also be proper for the prosecutor to remind the jury when none of these events has occurred." *Mikos*, 539 F.3d at 718 (Pet. App. A, 26a).

Judge Posner dissented, reasoning that using Mikos's silence to demonstrate lack of remorse warranted reversal of his death sentence. Noting a study that found lack of remorse to be the third most powerful aggravating factor in capital sentencing, Judge Posner concluded that affirmative conduct, rather than mere silence, is required to prove lack of

remorse: "a failure [to express remorse] might defeat the defendant's effort to plead remorse as a mitigating factor; but the absence of a mitigating factor cannot automatically be converted to the presence of an aggravating one." *Id.* at 723 (Pet. App. A, 38a).

REASONS FOR GRANTING THE WRIT

First, this Court held in *Griffin v. California*, 380 U.S. 609, 615 (1965), that the Fifth Amendment's Self-Incrimination Clause "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." A survey of cases from the lower federal courts and the state courts, however, reveals utter confusion about detecting *Griffin* error. The application of *Griffin* below highlights the confusion. The court precipitously rejected Mikos's argument after looking at only one half of the two-part test that the federal courts of appeals sometimes apply, focusing solely on the prosecutor's intent rather than on the far more important nature of the statement's impact on the jury. Therefore, this case provides the Court with the much-needed opportunity to articulate a standard for effectuating *Griffin*.

Second, in *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court recognized a due process right for indigent criminal defendants to expert assistance. Nearly a quarter century after *Ake*, the scope of the due process right to access to experts in capital cases remains unclear, as are the standards for funds for expert assistance in such cases under 18 U.S.C.

§ 3599(f) (2006). The district court arbitrarily denied funds for Mikos's desired ballistics expert merely to save the cost of an airline ticket, without any knowledge that any expert with the specific expertise needed even existed locally (and despite counsel's uncontradicted representation that one did not). The result was a demonstrably unfair trial: in contrast to the equal adversarial process this Court envisioned in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, Mikos lacked an expert to refute the government's highly unreliable ballistics "science." This Court should grant certiorari to answer the question of whether and in what circumstances an indigent capital defendant has a statutory or due process right to assistance from an expert with particular qualifications.

Third, in *Mitchell v. United States*, 526 U.S. 314, 330 (1999), this Court reserved the issue squarely presented in this case: whether silence bears upon the determination of lack of remorse in sentencing. Ten years after *Mitchell*, and lacking this Court's guidance, courts are divided and the happenstance of jurisdiction is frequently what determines whether a defendant's silence can be used to put him to death. A clear rule is manifestly necessary: "[i]n a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring). The record in this case allows the Court to address the issue head on, as no evidence supporting lack of remorse exists besides Mikos's

decision to remain silent and contest his guilt. This case calls out for this Court's attention to resolve this fundamental constitutional question, lest Mikos and others be executed pursuant to a death sentence obtained in violation of the Fifth Amendment.

I. This Court Should Grant Certiorari To Enforce *Griffin*'s Ban On Government Comments Regarding The Defendant's Exercise Of His Fifth Amendment Right Not To Testify.

Although *Griffin* holds that the Fifth Amendment's Self-Incrimination Clause "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt," 380 U.S. at 615, there is a gap in this Court's Fifth Amendment jurisprudence concerning how to determine whether government comments violate this crucial right. Since before *Griffin*, some federal courts have applied a two-part test to determine whether prosecutors have violated that right: a defendant's "right against self-incrimination is violated only when 1) it was the prosecutor's manifest intention to refer to the defendant's silence, or 2) the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's silence." *United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir. 1996) (quotation and citation omitted); *see also United States v. Wright*, 309 F.2d 735, 738 (7th Cir. 1962); *Knowles v. United States*, 224 F.2d 168, 170 (10th Cir. 1955).

This Court has never addressed this two-part test, and the lower courts' Fifth Amendment analysis has evolved away from this Court's jurisprudence to become less protective of the right against self-incrimination. The decision below provides a clear example of this evolution: failing even to cite *Cotnam* or the test, the court held simply that the prosecutor's statements were not "efforts to hold [Mikos's] silence against him," but instead were "efforts to hold his *conduct* against him." *Mikos*, 539 F.3d at 710 (emphasis in original) (Pet. App. A, 7a). Thus, the Seventh Circuit looked only to the prosecutor's intent and did not consider whether the prosecutor's "remark was of such a character that the jury would 'naturally and necessarily' take it to be a comment on the defendant's silence." *Cotnam*, 88 F.3d at 497.

This Court has held commentary that "alludes" to a defendant's failure to testify or that "suggest[s]" a defendant's failure to testify is "evidence of guilt" to be impermissible. *Portuondo v. Agard*, 529 U.S. 61, 69 (2000); *United States v. Hasting*, 461 U.S. 499, 510-11 (1983); *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976). The decision below did not, and even the two-part test of the courts of appeals does not. The two parts are (1) a test regarding the prosecutor's manifest intent, and (2) a test regarding how the jury may have interpreted the prosecutor's comments.

The first part of the test requires actual, "manifest" prosecutorial intent. Yet a defendant's right to remain silent may be violated by comments made without "intent": "A wholly innocent reference

to a defendant's silence is as much of a Fifth Amendment violation as a calculated effort to call the jury's attention to the fact that a defendant did not testify." *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 816 n.402 (Fall 1999).

The second part finds a Fifth Amendment violation only if the jury "necessarily" took the statement as a comment on the defendant's silence. While this part of the test correctly focuses on the effect of the statement, the "necessarily" standard provides no protection from the sly or subtle allusion or suggestion, even when the jury reasonably could have understood – or probably did understand – the prosecutor's statement to comment on the defendant's silence. *See* Jules Epstein, *Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding "Lack of Remorse" Testimony and Argument in Capital Sentencing Proceedings*, 14 TEMP. POL. & CIV. RTS. L. REV. 45, 63-64 (Fall 2004).

The government argued below that Mikos "doesn't have to say a word. He does not have to tell you where that gun is. But this is not a game of hide-and-go-seek." (Pet. App. G, 66a.) This argument highlighted for the jury the fact that Mikos did not "say a word" and invited the jury to punish him for "hid[ing]." A court using a Fifth Amendment test consonant with *Griffin* would have concluded that those comments caused an impermissible constitutional violation.

This Court should require lower courts to follow *Griffin* more closely by establishing a test that

focuses on whether the prosecutor's statement in question brought the defendant's silence to the jury's attention. A conclusion that the prosecutor did not intend to do so must not end the inquiry. Furthermore, the "necessarily" standard *by definition* will overlook many statements that do in fact bring the defendant's silence to the jury's attention in violation of *Griffin* and the Fifth Amendment. Therefore, an appropriate test – in keeping with this Court's jurisprudence – would ask whether there is a "reasonable probability" that the jury understood a prosecutor's statement to refer to the defendant's silence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (referencing the standard for detecting a violation under *Brady v. Maryland*, 373 U.S. 83 (1963)). This test will protect against suggestions about and allusions to, as well as direct comments about, the defendant's silence.

This Court should therefore grant certiorari to adopt a test that will fairly and effectively implement its *Griffin* and Fifth Amendment right-to-silence jurisprudence.

II. This Court Should Grant Certiorari To Decide Whether And In What Circumstances In A Capital Case An Expert With Particular Qualifications Is "Reasonably Necessary For The Representation" Of An Indigent Capital Defendant Under 18 U.S.C. § 3599(f) Or Due Process.

Under 18 U.S.C. § 3599(f) (2006), indigent federal capital defendants are entitled to expert services upon a finding that such services are

"reasonably necessary" for the representation of the defendant.[2] (Pet. App. D, 46a.) Congress did not define the term "reasonably necessary," nor has this Court provided guidance on when expert services are "reasonably necessary for the representation of the defendant" in a capital case. The term "reasonably necessary" is qualitatively different from (and provides a lower threshold of need than) the "necessary" standard Congress adopted for expert services in non-capital cases in 18 U.S.C. § 3006A(e) (2006).[3] (*See id.* at 46a, 48a); *see generally Harbison v. Bell*, No. 07-8521, slip op. (U.S. Apr. 1, 2009) (relying on the language used in Section 3599(e) to inform the statute's interpretation).

For indigent capital defendants in federal court, Section 3599(f) is the mechanism for enforcing the due process right to expert assistance articulated by this Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* recognized that an expert can be one vital part of the "raw materials integral to the building of an effective defense" and thus can help ensure that a defendant receives a fair trial. *Id.* at 77.

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[2] Before March 9, 2006, this provision was located at 21 U.S.C. § 848(q)(9) (2000).

[3] In 1988, when Congress enacted what is now Section 3599(f), *see* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4382, 4387 (1988), Section § 3006A already provided for the distribution of funds for "necessary" experts in federal criminal cases, *see* 18 U.S.C. § 3006A (1988). Congress need not have enacted a second statute for expert services in capital cases – what became Section 3599(f) – unless it desired to provide a different standard ("reasonably necessary") in those cases.

This case raises a precise question as to the Section 3599(f) standard, particularly in light of the due process right it seeks to implement: whether and in what circumstances an expert *with particular qualifications* is "reasonably necessary for the representation" of an indigent capital defendant under Section 3599(f). The plain language of the statute suggests the answer: by focusing on what is "reasonably necessary *for the representation of the defendant*" in a capital case, Section 3599(f) directs district courts to give reasonable deference on the question of the needed expertise to the experienced appointed counsel to whom the court has entrusted a capital defense. (*See* Pet. App. D., 46a (emphasis added).)

Through *Daubert*, 509 U.S. at 596 and its progeny, this Court put its faith in the tools of *equally matched* adversaries – including informed, "[v]igorous cross-examination" and the "presentation of contrary evidence" – to ferret out problems with evidence that was "shaky but admissible." Yet in a criminal case, the government has "an overwhelming advantage" over indigent criminal defendants in securing and presenting expert testimony. Paul C. Giannelli, Ake v. Oklahoma: *The Right To Expert Assistance In A Post*-Daubert, *Post-DNA World*, 89 CORNELL L. REV. 1305, 1307 (2004).

Section 3599(f) provides a standard that allows this Court's plan for experts under *Daubert* an opportunity to work properly; however, at trial below, it did not. The government called three experts to identify the type of gun Mikos owned; one of those experts, FBI ballistics and toolmarks expert

Paul Tangren opined that Mikos's gun could have fired the bullets that killed Brannon. The government's murder case hinged upon its expert testimony on the missing gun: indeed, Tangren testified longer than any other witness at the trial. But his opinion rested upon classic "voodoo science." Tangren purported to rely for his conclusions on the FBI's GRC database, even though every gun in the database of the exact make and model as Mikos's gun imprinted bullets with *six grooves*, while the murder bullets had *eight grooves* (11Tr2184-90); Tangren also fired a *different* model gun to get "test" bullets that matched the murder bullets in toolmark characteristics. (10Tr2127; 10Tr2138; 11Tr2184.)

LaMagna, the qualified expert defense counsel identified to the court, would have made these crucial points for the defense in a manner that would have undermined Tangren's very vulnerable testimony. LaMagna had published on the very topic of analyzing toolmarks on fired bullets and was familiar with and critical of the FBI database and reliance upon "scientific" means for tying bullets to a gun when the gun is not present to be tested. (R78, Ex. 1.) Indeed, LaMagna was recently cited in the National Academy of Sciences' "Strengthening Forensic Sciences in the United States: A Path Forward," released earlier this year.[4] Mr. LaMagna was available and willing to testify for the defense, but the district court refused to approve hiring

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[4] NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD at S-9 n.23 & 3-20 n.89 (2009) (pre-publication version).

LaMagna because it did not want to pay for his airline ticket from Boston to Chicago. (Pet. App. B, 41a.) So the court directed the defense to select a local expert – despite having no knowledge that such an expert even existed and despite defense counsel's representation in Mikos's motion that they had attempted and failed to locate "a local person who is an appropriate expert." (R78 at 4.) In contrast, the government flew all three of its gun-related experts to Chicago from the East Coast. (10Tr2033; 11Tr2252-53; 11Tr2261-62.)

The result was disastrous for the defense, and for the fundamental fairness of the proceeding. Given the court's order, the best person counsel could find had only generalized knowledge and lacked LaMagna's specific experience with the FBI ballistics techniques and databases. (R283, Ex. 1; 10Tr2117-18.) Thus, he was ill-equipped to support Mikos's *Daubert* challenge to the admissibility of Tangren's testimony. In rejecting Mikos's challenge to Tangren, the district court explained that this expert's affidavit was "not very convincing." (R310 at 3.) Ultimately, the local person's experience was so removed from Tangren's that defense counsel decided presenting opinion testimony from him would serve no purpose at trial. (10Tr2117-18.)

The issue here is *not* whether a defendant can have a particular individual serve as an expert. Rather, the issue is whether an expert with a particular narrowly-focused area of expertise on a central issue in a capital case is "reasonably necessary" to the representation and to ensuring the defendant receives a fair trial. Defense counsel

found no one locally with the particular expertise that LaMagna possessed; the district court never indicated that it knew of anyone locally who qualified; and the government went all the way to the East Coast for its three experts on the crucial issue of the gun. Obviously the required expertise is held by few, and equally obviously this particular expertise was crucial to try this case.

Daubert and its progeny do not contemplate the stark imbalance between adversaries demonstrated in this case. As civil cases, their standards for admissibility presuppose equally-matched adversaries in the civil context, *not* the inherently unequal situation of federal government and indigent defendant. *See generally* Lee Richard Goebes, *The Equality Principle Revisited: The Relationship of* Daubert v. Merrell Dow Pharmaceuticals *to* Ake v. Oklahoma, 15 CAP. DEF. J. 1 (2002). The adversarial process in which this Court took comfort, *Daubert*, 509 U.S. at 596, cannot ensure due process or fundamental fairness where – as here – one adversary (the government) has access to specialized expertise and the trial court denies an indigent defendant access to the same expertise.

This Court should grant certiorari to define the scope of the "reasonably necessary" standard under Section 3599(f) and of the due process right to an expert with particular expertise in a capital case.

III. This Court Should Grant Certiorari To Decide Whether The Fifth Amendment Allows The Government To Use A Defendant's Silence To Establish The Death Penalty Aggravating Factor Of Lack Of Remorse.

At the sentencing hearing that led to Mikos's death sentence, the government exploited a second gap in this Court's Fifth Amendment jurisprudence: it suggested that Mikos's "*failure to confess*" – his exercise of his Fifth Amendment right to remain silent – demonstrated his lack of remorse, an aggravating factor weighing toward the death penalty. *Mikos*, 539 F.3d at 722 (Posner, J., dissenting) (emphasis added) (Pet. App. A, 35a). This Court has never addressed – indeed, it has expressly reserved – the question "whether silence bears upon the determination of lack of remorse." *Mitchell*, 526 U.S. at 330. Since *Mitchell*, federal and state courts have failed to develop a consistent Fifth Amendment jurisprudence; there is no definitive rule on the life-or-death question whether the government can use silence to establish remorselessness as an aggravating factor. Judge Posner suggested the answer: "[m]ere silence is not enough to demonstrate lack of remorse. . . . Such a failure might defeat the defendant's effort to plead remorse as a mitigating factor; but the absence of a mitigating factor cannot automatically be converted to the presence of an aggravating one." *Mikos*, 539 F.3d at 723 (Posner, J., dissenting) (Pet. App. A, 38a).

Many courts have held (erroneously) that the Fifth Amendment does not prohibit the government

from using a defendant's silence to establish lack of remorse and thereby to enhance a sentence. This case offers a prime example. The Seventh Circuit specifically approved the use of Mikos's silence to establish the death-penalty aggravating factor of lack of remorse: "Mikos fought every charge every step of the way. *That was his right, but in the process he showed no remorse*, compared with a person who conceded some culpability." *Mikos*, 539 F.3d at 718 (emphasis added) (Pet. App. A, 26a). *Accord, United States v. Ronquillo*, 508 F.3d 744, 747-49 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 2458 (2008); *United States v. Kennedy*, 499 F.3d 547, 552 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1648 (2008); *Bates v. Lee*, 308 F.3d 411, 420-22 (4th Cir. 2002). As Judge Posner explained in dissent, "[t]he *only inference* the jury could have drawn" from the government's comments during sentencing was that Mikos's "failure to confess to the murder in open court showed that he lacked remorse." *Mikos*, 539 F.3d at 722 (Posner, J., dissenting) (emphasis added) (Pet. App. A, 35a). The Seventh Circuit thus endorsed what the Fifth Amendment would seem to prohibit: using Mikos's failure to confess against him to justify imposing the harshest possible sentence for the crime.

A number of state courts have similarly concluded that the Fifth Amendment does not prohibit using a defendant's silence to infer lack of remorse. *See State v. Muscari*, 807 A.2d 407, 416-17 (Vt. 2002); *State v. Clegg*, 635 N.W.2d 578, 580-81 (S.D. 2001); *Lee v. State*, 36 P.3d 1133, 1141 (Wyo. 2001); *People v. Cox*, 879 N.E.2d 459, 478 (Ill. App.

Ct. 2007), *appeal denied*, 888 N.E.2d 1186 (Ill. 2008); *Warner v. State*, 144 P.3d 838, 891 (Okla. Crim. Ct. App. 2006), *cert. denied*, 127 S. Ct. 2266 (2007); *State v. Juniors*, 915 So.2d 291, 335-36 (La. 2005); *State v. Murphy*, 988 P.2d 715, 720 (Idaho Ct. App. 1999); *State v. Barnes*, 637 A.2d 398, 403 (Conn. Ct. App. 1994); *State v. Fuerst*, 512 N.W.2d 243, 247 (Wisc. Ct. App. 1994).

In contrast, however, several federal courts have correctly condemned summation arguments that exploit silence to establish lack of remorse. For example, in *Beardslee v. Woodford*, 358 F.3d 560, 586-87 (9th Cir. 2004), the Ninth Circuit held "impermissible under *Griffin*," the prosecutor's argument at sentencing that the defendant "had no remorse," stating that because defendant had not testified to the jury, "you were not able to observe his demeanor and sincerity . . . so you, too, could judge if there was any feeling in the man." Similarly, in *Lesko v. Lehman*, 925 F.2d 1527, 1544 (3d Cir. 1991), the prosecutor argued that the defendant didn't have the "'common decency to say I'm sorry for what I did.'" The Third Circuit held that this "penalized the assertion of his [F]ifth [A]mendment privilege against self-incrimination, in violation of the rule in *Griffin*." *Id.* at 1545; *see, e.g., Ketchings v. Jackson*, 365 F.3d 509, 512-14 (6th Cir. 2004); *United States v. Mezas de Jesus*, 217 F.3d 638, 644-45 (9th Cir. 2000); *United States v. Rivera*, 201 F.3d 99, 101-02 (2d Cir. 1999); *United States v. Roman*, 371 F. Supp. 2d 36, 50 (D.P.R. 2005); *United States v. Cooper*, 91 F. Supp. 2d 90, 112-13 (D.D.C. 2000); *United States v. Davis*, 912 F. Supp. 938, 946 (E.D. La. 1996).

Several state courts also have concluded that the government cannot exploit a defendant's silence at trial to establish lack of remorse. The Montana Supreme Court has held that under "state and federal constitutional protections against self incrimination," "a sentencing court may not draw a negative inference of lack of remorse from the defendant's silence at sentencing where he has maintained, throughout the proceedings, that he did not commit the offense of which he stands convicted – i.e. that he is actually innocent." *State v. Shreves*, 60 P.3d 991, 996 (Mont. 2002). Similarly, the New Hampshire Supreme Court has held that the Constitution prohibits a factfinder from drawing a negative inference of lack of remorse from a defendant's silence at sentencing, because doing so would punish a defendant for exercising his Fifth Amendment right to remain silent. *State v. Burgess*, 943 A.2d 727, 736 (N.H. 2008); *see also People v. Ervin*, 990 P.2d 506, 537 (Cal. 2000); *Brake v. State*, 939 P.2d 1029, 1033 (Nev. 1997); *People v. Yennior*, 282 N.W.2d 920, 920 (Mich. 1977); *People v. Young*, 987 P.2d 889, 894-95 (Colo. Ct. App. 1999); *State v. Hardwick*, 905 P.2d 1384, 1391 (Ariz. Ct. App. 1995); *State v. Williams*, 389 S.E.2d 830, 833-34 (N.C. Ct. App. 1990).

Lack of remorse frequently is an aggravating factor in death penalty cases, and a clear administrable rule is manifestly necessary.[5] This

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[5] Judge Posner noted that one study found that "39.8 percent of jurors in capital cases said that a lack of remorse either made them or would have made them more likely to vote to impose the death penalty," and another concluded "that lack of remorse

Court should grant certiorari and decide whether a defendant's silence can be exploited to establish lack of remorse.

CONCLUSION

This Court should grant this Petition for Writ of Certiorari.

Dated: April 16, 2009

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was the third most powerful aggravating factor in capital sentencing." *Mikos*, 539 F.3d at 724 (Posner, J., dissenting) (Pet. App. A, 39a-40a).

Appendix

Appendix A

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Ronald MIKOS, Defendant-Appellant.
Nos. 06-2375, 06-2376, 06-2421.

Argued Aug. 16, 2007.
Decided Aug. 25, 2008.
Rehearing and Rehearing En Banc Denied Nov. 17, 2008.

*708 David E. Bindi (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Barry Levenstam (argued), Jenner & Block, John M. Beal, Chicago, IL, for Defendant-Appellant.

Before EASTERBROOK, Chief Judge, and POSNER and EVANS, Circuit Judges.

EASTERBROOK, Chief Judge.

Medicare does not cover the costs of routine medical procedures. Ronald Mikos, a podiatrist, performed nothing but routine procedures, such as trimming the toenails of people unable to clip their own. Yet he billed Medicare for thousands of surgeries. When officials became suspicious, Mikos arranged for some of his elderly patients (many of whom were not mentally competent) to submit affidavits stating that surgeries had indeed

occurred (though at trial Mikos's secretary of seven years testified that he had never performed a single surgery during her time in his employ, and medical specialists who examined these people found no signs of surgery). Other patients were less obliging, so Mikos wrote affidavits for them and had their signatures forged. A grand jury issued subpoenas to seven of Mikos's patients. He visited them, trying to dissuade each from testifying. None appeared to testify-whether because of Mikos's persuasiveness or because of their own mental and physical limitations, the record does not show. But we know why one of the seven did not show up. Joyce Brannon, who by then was cooperating with the investigators, had been shot six times at close range. After concluding that Mikos had slain her, the jury sentenced him to death. See 18 U.S.C. § 1512(a)(1)(A). It also convicted him of other crimes, including fraud, obstruction of justice, attempting to influence a grand jury, and witness tampering. 18 U.S.C. §§ 1341, 1347, 1503, 1505, 1512(b)(1).

The evidence of fraud and witness tampering is overwhelming and essentially uncontested, though a dispute about the amount of loss requires some attention later. The evidence of murder also is strong.

Brannon had retired from her job as a nurse to become the secretary of a church, where she lived in the basement. The lack of shell casings led police to conclude that the killer had used a revolver. The bullets were .22 long rifle rim-fire, brass-coated rounds with solid round noses, concave bases, and

multiple knurled cannelures. Each bullet had been fired from a barrel with eight lands and grooves; the rifling had a right-hand twist.

Mikos owned a gun that could have fired those bullets. The police knew this because, three weeks before Brannon's murder, they had been called to the house of Shirley King, one of Mikos's girlfriends, and discovered that Mikos kept multiple firearms in King's residence. When Mikos could not produce a current firearm owner's identification card, the police took away the guns and ammunition, giving Mikos a detailed inventory. After renewing his card, Mikos retrieved the guns and transferred them to his storage unit at a stand-alone facility. After the murder, police searched the unit and found everything on the inventory, down to the last bullet-except for a .22 caliber Herbert Schmidt revolver that fired long rifle ammunition. A search of Mikos's car turned up a box of Remington .22 long rifle rim-fire, brass-coated rounds with solid round noses, concave bases, and multiple knurled cannelures. Twenty shells were missing from the box. The Schmidt revolver was never found. The car contained one spent ***709** casing with a mark made by a hemisphere-shaped firing pin. A Schmidt .22 revolver would have left such a mark (an unusual one).

One member of the church's staff saw Mikos (or someone who looked like him) at the church a week before Brannon's murder. The witness described the intruder's hair as gray, which Mikos's was not,

but when searching his car the police found a bottle of gray hair coloring. That car also contained handwritten details of the church's schedule-details that revealed when a person could enter Brannon's apartment without being seen. Data on his smart phone showed that he had been trying systematically to contact all of his patients who had been subpoenaed to provide records or testimony in the investigation. Records showed that he placed and received calls that went through cell towers near Brannon's church at approximately the time that he was identified as being there the week before the murder, and again one and two days before the murder. A jury could conclude that he had been watching to find the right opportunity to slip into Brannon's apartment. He had a motive to want Brannon silenced, and she (unlike many other patients) had resisted his efforts at persuasion. He owned a weapon that could have done the job, and the gun's disappearance is revealing. Motive, opportunity, and ability allowed a jury to find that Mikos killed Brannon to prevent her from testifying-and that is a capital crime.

I

1. Federal agents entered Mikos's storage unit on the authority of a "sneak and peek" warrant. This kind of warrant permits inspection but not seizure. See 18 U.S.C. § 3103a. Lack of seizure explains the "peek" part of the name; the "sneak" part comes from the fact that agents need not notify the owner until later. Such warrants are designed to permit an investigation without tipping off the suspect.

Agents who executed the sneak-and-peek warrant found so many firearms, and so much ammunition, that they could not learn what was there without removing the guns and ammo from the storage unit and spreading them on the ground immediately outside the door, where they could be photographed. The agents also decided that there was no point in deferring the seizure, so one of their number was dispatched to obtain a regular warrant. It issued swiftly, and approximately four hours after arriving at the storage unit the agents executed the regular warrant and hauled away the guns and ammo. While waiting for that warrant, agents had tested several of the weapons to see whether they worked (they did).

Mikos contends that the evidence seized from the storage unit should have been suppressed, because by moving some of the guns outside and testing them the agents effected a "seizure" that the warrant did not authorize. We may assume that a seizure occurred, cf. *Bond v. United States,* 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000) (feeling an opaque bag to gain information about its contents); *Arizona v. Hicks,* 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) (turning audio gear over to read its serial number), but use of the exclusionary rule would be unwarranted. First, the § 3103a warrant authorized the agents to enter and inspect the storage locker, and by moving and testing the guns agents did not cause Mikos any distinct injury; second, a seizure was inevitable once the agents saw Mikos's arsenal. A premature

seizure does not lead to exclusion of evidence when a warrant, authorizing everything that occurred, was certain to issue. See, e.g., *710 *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *United States v. Tejada,* 524 F.3d 809 (7th Cir.2008). Cf. *Hudson v. Michigan,* 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) (exclusion unjustified when the error is not in the causal chain leading to the evidence). Here the steps to obtain a regular warrant were begun almost as soon as the agents saw the trove and were ongoing when the test-firings occurred; the fully authorized seizure took place within hours. Suppression of this evidence, seized with both probable cause and judicial authorization, would be a windfall that the fourth amendment does not command.

2. Mikos contends that the prosecutor violated the fifth amendment's self-incrimination clause by asking the jury to infer guilt from the fact that the Schmidt revolver was missing. He characterizes this line of argument as an impermissible comment on his failure to testify. See *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Whether Mikos testified was not relevant to the inference the prosecutor proposed, however; it would have been equally strong had Mikos tried to explain the gun's disappearance but left the jury unconvinced. It is entirely appropriate to draw an inference from the facts that (a) Mikos owned a particular weapon, (b) the weapon could have inflicted the fatal wounds, and (c) the weapon vanished at about the time of the murder, even though other weapons known to have been in the

same place are accounted for. It is these facts, and not Mikos's decision to remain silent, that support an inference unfavorable to him. Nothing in *Griffin* or its successors prevents a prosecutor from urging the jury to draw inferences from events that can be established by evidence independent of the accused's silence. See *United States v. Robinson,* 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988); *United States v. Sblendorio,* 830 F.2d 1382, 1391-92 (7th Cir.1987).

Mikos finds significance in the prosecutor's statements to the jury that "the only possible explanation for this gun being missing is because [Mikos] doesn't want it brought in here" and that Mikos was playing a "game of hide-and-go-seek". He characterized these statements as efforts to hold his silence against him. We read them, however, as efforts to hold his *conduct* against him. Hiding a gun is conduct, not (lack of) speech. Drawing inferences from the defendant's (mis)conduct is what a trial is all about.

3. The power of the inference from the gun's disappearance depended on proof that it could have fired the bullets that killed Brannon. Paul Tangren, an FBI agent who specializes in firearms' rifling and ballistics, testified as an expert that the gun's serial number revealed it to be a "Deputy Combo" model, and that a database of weapons maintained by the FBI shows that barrels of Herbert Schmidt Deputy Marshal models have eight grooves with a right-hand twist, matching the bullets that killed Brannon. Tangren also testified

that the Deputy Combo and Deputy Marshal guns are physically identical; only the trade name differs. He retrieved a Herbert Schmidt Deputy Marshal revolver from the FBI's armory, fired it, and verified that the barrel had eight grooves and a right twist. Mikos insists that his gun was a "Model 21" rather than a "Deputy Combo" or "Deputy Marshal" and that the Herbert Schmidt Model 21 has only six grooves. Tangren testified, however, that the serial number could have been assigned only to a "Deputy Combo" model.

Mikos contends that the district judge should not have allowed the agent to deliver any of this testimony. The agent was not qualified as an expert under *711Fed.R.Evid. 702, Mikos maintains, because there is no scholarly literature on the rifling of gun barrels, and the FBI's database is inaccurate (or at least incomplete). Publication is not a *sine qua non* of expert testimony, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and whether the gun was a "Deputy Combo" or a "Model 21" is a factual question on which the district judge's findings must stand unless clearly erroneous, which they are not. (The jury had to decide in the end whether the missing gun was a model that would have produced bullets with eight grooves; we speak here only of the district court's preliminary findings that determine admissibility. See Fed.R.Evid. 104(a); *United States v. Martinez de Ortiz*, 907 F.2d 629 (7th Cir.1990) (en banc).)

District judges may admit testimony resting on

"scientific, technical or otherwise specialized knowledge" that will assist the trier of fact. Fed.R.Evid. 702. Testimony based on the FBI's rifling database may not have been "scientific", but it was both "technical" and "specialized". Rule 702 does not condition admissibility on the state of the published literature, or a complete and flaw-free set of data, but on these criteria:

> [A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The district court concluded that these requirements had been satisfied-that the FBI's rifling data were "sufficient" and that the witness has applied "reliable ... methods" in a reliable fashion. Appellate review is deferential, see *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), and the district court did not abuse its discretion. Tangren not only looked up the content of the rifling database (learning that 16 models could have produced the sort of rifling observed on the bullets) but also tested the database's contents by firing a Herbert Schmidt Deputy Marshal revolver, which produced bullets with eight grooves and a right twist. The only purpose of the exercise was to learn whether Mikos's revolver could have been the murder

weapon; the FBI agent candidly disclosed that at least 15 other models also could have fired those bullets. ("At least" because the database does not include every make and model of gun ever sold.) A database that does not include every weapon ever made can produce false negatives-that is, a gun that actually fired the bullets may have been omitted from the database-but not false positives, provided that the information about the guns actually tested has been recorded accurately.

Mikos contends that "the practice of matching spent bullets to a make and model gun" does not satisfy Rule 702, but the expert did not testify that bullets with such-and-such rifling must have come from a particular model of gun, let alone from a specific weapon. That would indeed overstate what is to be learned from the database. See Adina Schwartz, *A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification,* 6 Colum. Sci. & Tech. L.Rev. 2 (2005). Tangren's testimony reliably applied the data for the purpose of saying that the rifling on the bullets did not *rule out* a Herbert Schmidt Deputy Combo revolver. That testimony, even with so limited a force, was relevant under Fed.R.Evid. 401 (Mikos likely would have been acquitted had the database shown that none of his guns could have been used to ***712** kill Brannon), and reliable given its limitations. The district court did not abuse its discretion in denying Mikos's request to exclude the evidence under Fed.R.Evid. 403 as unduly prejudicial. The jury was entitled to hear Tangren's evidence.

4. Having allowed Tangren to testify, Mikos insists, the judge should have granted his motion to hire ballistics expert David LaMagna at public expense. Both the Constitution, see *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and the Criminal Justice Act, see 18 U.S.C. § 3006A(e)(1), entitle defendants to the services of experts necessary to meet the prosecution's case. The projected expense to retain LaMagna, at $250 an hour, would have exceeded the presumptive ceiling for an expert's services ($7,500, see 18 U.S.C. § 3599(g)(2), since this is a capital case), and the district court told Mikos that he would approve another ballistics expert whose rates were lower, or whose travel time would have been less. (Experts bill for their travel; that's one reason why LaMagna's total fees would have exceeded the cap.) Mikos asked the court to let him hire John R. Nixon in lieu of LaMagna. The court gave its permission. Nixon examined the bullets and prepared a report-but the defense did not put Nixon on the stand or use his report as evidence. (It did proffer an unreasoned statement by Nixon that "there can be no guaranty of consistency of land & groove measurements between crime laboratories" and that "suspect data [therefore] must have found its way into" the FBI's database, but these assertions did not respond to any issue in the case-and, given the absence of reasoning, the statement was not admissible.)

Mikos's appellate argument that the district judge should have let him hire LaMagna is a dud.

Abstract propositions about entitlement to expert assistance go nowhere when the defendant *had* an expert. Mikos does not tell us what LaMagna could have done that Nixon was unable to do; for that matter, he does not tell us why he did not use Nixon as an expert. Nixon could have relied not only on his own work but also on LaMagna's published work, which critiques using ballistics data to make unique matches of bullets to guns (something that, to repeat, Tangren did not do). See Joan Griffin & David LaMagna, *Daubert Challenges to Forensic Evidence: Ballistics Next on the Firing Line,* 26 Champion 20 (Sept./Oct.2002). Champion, a glossy publication for the defense bar, is not exactly a scholarly journal, and this short article was not refereed, but an expert still could have relied on it to the extent that it contained useful information about the FBI's rifling-characteristics database. See Fed.R.Evid. 703.

For all we know, Nixon ended up agreeing with Tangren, and perhaps LaMagna would have done so too. Neither the Constitution nor the Criminal Justice Act entitles a defendant to the best (or most expensive) expert, or to more than one expert if the first does not reach a conclusion favorable to the defense. Just as a defendant who relies on counsel at public expense must accept a competent lawyer, rather than Clarence Darrow, see *Morris v. Slappy,* 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), so a defendant who relies on public funds for expert assistance must be satisfied with a competent expert. Mikos does not argue that Nixon was incompetent (or even below average), so he has

received his due.

5. Mikos wanted a jury-selection expert as well as a ballistics expert. The district judge turned him down flat on this second request, observing that the Criminal Justice Act and § 3599 (21 U.S.C. § 848(q) until its recodification in 2006) provide for experts on issues that affect ***713** guilt and sentencing. As far as we can tell, no district court (and certainly no court of appeals) has held that there is a statutory or constitutional entitlement to a jury-selection expert at public expense.

The Constitution entitles every defendant to a fair trial before an unbiased jury. The function of a jury-selection expert, however, is to bias the jury in his employer's favor. Whether this is a genuine field of expertise is open to doubt; some studies conclude that people who use jury-selection experts do no better (and may do worse) than those who do not. See Michael O. Finkelstein & Bruce Levin, *Clear Choices and Guesswork in Peremptory Challenges in Federal Criminal Trials,* 160 J. Royal Statistical Society A 275 (1997); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 Stan. L.Rev. 491 (1978). No matter. There is no right to an expert whose goal is to produce jurors who favor one side, and whose leanings (doubtless slight, or they would not take expertise to ferret out) are undetectable to the other side, and thus will not lead to challenges for cause or peremptory strikes.

Perhaps one could put a better face on this and say that the goal of a jury-selection expert is to find and expose those subtle signs of bias in the venire that might elude counsel (and the district judge) unless detected in a scientific manner. If a prosecutor retains a jury-selection expert, a defendant might be able to show the need for one to level the playing field. But the prosecutor did not use a jury-selection expert in this case, and Mikos was not entitled to one. That could only lead to an arms race, and a race to introduce concealable biases into juries is not one that should be waged. See *Miller-El v. Dretke,* 545 U.S. 231, 266-73, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (Breyer, J., concurring); *Batson v. Kentucky,* 476 U.S. 79, 102-03, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (Marshall, J., concurring).

6. One final issue before we turn to the sentences. Mikos submits that the evidence was insufficient to support the jury's verdict that he murdered Brannon. No one saw him do it; the gun was not found; the killer left no fingerprints. And what was his motive?, counsel inquires. True, Mikos wanted to stay out of jail for Medicare fraud, but his lawyer observes that Mikos had submitted bogus claims on behalf of so many patients that he could not possibly have thought that he could silence them all. But he didn't need to. It would have been enough to silence the patients whose evidence or testimony had been sought. Mikos set out to do just that-by persuasion, by submitting forged affidavits in the patients' names, and, the jury could conclude, by killing the one mentally competent patient who had made it clear that she would assist

the prosecutors. Mikos may have been deluded (or desperate) in thinking that, if he could prevent an initial batch of patients from producing evidence of fraud, then the investigation would be called off-for, by the time the grand jury started issuing subpoenas, agents had inspected his books and concluded that *all* of his bills had been fabricated-but as long as Mikos thought that he could divert the investigators to easier targets he had a motive.

As for the lack of witnesses and fingerprints: The opening paragraphs of this opinion say all that is necessary. The evidence, though circumstantial, is damning. Alternative explanations, such as a burglary that went awry, are implausible; nothing was taken from (or even disturbed in) Brannon's apartment. Jurors learned that Mikos had been purchasing guns in *714 quantity; agents found not only a storage unit full of weapons but also more guns in the ceiling tiles of his home, and still more hidden under his rafters. A sensible jury could find beyond a reasonable doubt that Mikos shot Brannon in cold blood, with premeditation, to prevent her from testifying against him.

II

1. On the 24 non-capital convictions, Mikos received sentences of 60 months' imprisonment on each of 15 counts, and 78 months' imprisonment on each of the 9 remaining counts. All 24 sentences run concurrently and include restitution of $1.8 million. Mikos contends that the district court overestimated the Medicare program's financial

loss and as a result set the imprisonment and restitution too high.

During sentencing, Mikos's lawyer conceded that his total bills to the Medicare program were approximately $1.8 million. This led to a 16-level increase in his offense score under U.S.S.G. § 2B1.1(b)(1)(I) (range from $1 million to $2.5 million). That concession is not dispositive, Mikos now contends, because Medicare might not have paid all of these claims, and some of them may have been legitimate. Whether Medicare paid is irrelevant to the loss calculation under § 2B1.1, however, because that section deals with *intended* loss. Mikos billed the Medicare program for $1.8 million; that's the intended loss whether Medicare paid or not-unless some of the claims were legitimate. But the evidence shows that not one penny was payable. Mikos's appellate lawyer confuses legitimate *services* with legitimate *claims.* Mikos doubtless provided his patients with many services, such as removing ingrown toenails, but none of these routine services is covered by the Medicare program. He billed Medicare for podiatric surgery, and the record shows that he never performed any surgery. Thus all of the claims for payment from the Medicare program were illegitimate and the intended loss was $1.8 million.

Restitution is a different matter. It depends on actual rather than intended loss. See, e.g., *United States v. Webber,* 536 F.3d 584, 601-04 (7th Cir.2008); *United States v. Caputo,* 517 F.3d 935, 943 (7th Cir.2008); *United States v. George,* 403

F.3d 470, 474 (7th Cir.2005). It should have been a simple matter for the prosecution to show how much the Medicare program actually paid on Mikos's claims, but that evidence is not in the record. The burden of showing loss is on the prosecutor, so the award of restitution is vacated and must be recalculated on remand.

2. According to Mikos, the Federal Death Penalty Act, 18 U.S.C. §§ 3591-98, is unconstitutional because it violates the Indictment Clause of the fifth amendment (the Attorney General, not a grand jury, determines whether to seek capital punishment for a qualifying offense, and the statute does not require aggravating factors to be included in an indictment), because failure to apply the Federal Rules of Evidence and use of hearsay in sentencing violate the due process clause, and because the statutory aggravating factors are incomprehensible. These three arguments against the statute have been made in this circuit, and in others, to no avail.

The Indictment Clause argument has been made and rejected in *United States v. Robinson,* 367 F.3d 278, 290 (5th Cir.2004); *United States v. Allen,* 406 F.3d 940, 949 (8th Cir.2005) (en banc); and *United States v. Brown,* 441 F.3d 1330, 1367 (11th Cir.2006). The argument about evidence has been made and rejected in many circuits. See, e.g., *715 *United States v. Corley,* 519 F.3d 716, 723-27 (7th Cir.2008); *United States v. Fulks,* 454 F.3d 410, 438 (4th Cir.2006). The Supreme Court held in *Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079,

93 L.Ed. 1337 (1949), that the Constitution does not require application of the rules of evidence in capital sentencing, and in all the ferment about capital punishment in the years since then the Court has never suggested any inclination to overrule *Williams*. See *Wiggins v. Smith*, 539 U.S. 510, 536-37, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). The vagueness argument has been made and rejected in *United States v. Webster*, 162 F.3d 308, 354 (5th Cir.1998), among others. After *Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), rejected a functionally identical vagueness challenge, there is no room for maneuver. We rely on these decisions and see no constitutional reason why Mikos cannot be sentenced to death for his premeditated murder of a witness.

Only the indictment question calls for even brief comment. *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), held that aggravating factors that make a person eligible for capital punishment are sentencing considerations that need not be alleged in an indictment. The Federal Death Penalty Act, enacted in 1994, assumed that *Walton* is correct and does not require aggravating factors to appear in the indictment. But in 2002 the Supreme Court overruled *Walton* and held that aggravating factors that make a crime death-eligible (though not those used in a later balancing procedure, see *United States v. Fell*, 531 F.3d 197, 238-40 (2d Cir.2008) (collecting cases)) must be charged in the indictment. See *Ring v. Arizona*, 536 U.S. 584, 122

S.Ct. 2428, 153 L.Ed.2d 556 (2002), a decision much influenced by *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The indictment of Mikos includes several aggravating factors. All requirements of *Ring* and *Apprendi* have been satisfied.

Nonetheless, Mikos insists that the statute must be declared unconstitutional because *it* does not demand that the grand jury find the aggravating factors. He then contends that the statute is not severable, so that to find one constitutional flaw is to knock out the basis of all capital punishment. The argument goes wrong at the first step (and we need not decide whether the severability step is wrong as well), because *Ring* does not hold or imply that any part of the Federal Death Penalty Act is unconstitutional.

Ring does say that the Constitution demands that certain things be in an indictment if a capital sentence is to be valid, but the federal statute does not *forbid* aggravating factors in an indictment. It is silent on whether they are included. If the indictment complies with *Ring,* no constitutional error occurs. There is nothing to sever. As long as a defendant's rights under *Ring* are honored (as Mikos's were), it is a matter of indifference whether the rights were honored as a matter of statutory command or prosecutorial precaution. We have held much the same thing for 21 U.S.C. § 841. Defendants argued after *Apprendi* that § 841 is unconstitutional because it does not require drug quantities to be charged in indictments. We held, to

the contrary, that § 841 is silent on the subject, and that prosecutors are free to include all allegations needed to comply with *Apprendi*. Putting in the indictment more than the statutory floor does not imply that any law is unconstitutional. See *United States v. Brough*, 243 F.3d 1078 (7th Cir.2001). Cf. *United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

***716** Just so with the Federal Death Penalty Act. Title 18 says *what* must be proved, and sometimes it says how; other sources, including the Constitution, the Federal Rules of Criminal Procedure, and the common law, add details about which tasks fall to prosecutors, judges, grand juries, and petit juries. That one source of law is silent on a procedural issue, such as what an indictment must contain, just leaves it to another source. Look at 18 U.S.C. § 1347, the Medicare-fraud statute that Mikos has been convicted of violating. There is not a peep in § 1347 (or almost any other statute) about what must be in an indictment, but no one would say that this makes the whole Criminal Code a rollicking violation of the Indictment Clause. Other sources of law supply details about what indictments (and other legal documents) contain, so that defendants' constitutional rights are fully respected.

3. The Federal Death Penalty Act provides that, if a defendant is convicted of a capital crime and the prosecutor requests the death penalty, a jury must decide at a sentencing proceeding whether the accused had the necessary mental state and at

least one aggravating factor exists. If the jury unanimously answers both of these questions in the affirmative, see § 3593(d), it must balance all considerations to determine whether capital punishment is appropriate. We call these "considerations" rather than "factors" because, although there is a statutory list of "factors" that a jury *must* consider (if raised by a party), there is no limit to the number of case-specific ("non-statutory") considerations that *may* influence a jury.

The two statutory aggravating factors were that Mikos substantially planned and premeditated the murder, § 3592(c)(9), and that Brannon was "particularly vulnerable due to ... infirmity", § 3592(c)(11). Brannon had retired from nursing because she had become so obese that she needed assistance to rise from a chair. (She had other conditions commonly associated with obesity.) She could not have run away or resisted an intruder. The jury found both of these aggravating factors unanimously and beyond a reasonable doubt. It also found three non-statutory aggravating considerations. One was that Mikos killed Brannon to prevent her from testifying against him. The second was that the crime caused loss to Brannon's friends, family, and co-workers. The third was that Mikos had not demonstrated remorse for his crimes. All of these were found unanimously, and beyond a reasonable doubt.

Mikos asked the jury to find 33 mitigating considerations. Several of these drew majority

support. Eight members of the jury concluded, for example, that "Ronald Mikos has a loving relationship with his son, Ronald Mikos, Jr."; nine jurors concluded that Mikos's execution would cause his son "great pain and emotional distress." (A majority did not make similar findings for Mikos's other children.) A single juror concluded that Mikos's substance abuse had led to mental disorders that were mitigating (he submitted evidence that he began abusing prescription painkillers in the mid 1990s and began drinking heavily in 2001.) Two jurors concluded that the civil investigations into Mikos's fraud had caused him stress and led to drug and alcohol abuse, which was a mitigating consideration. Five jurors concluded that the delay in completing the civil investigation was a mitigating consideration. But only four jurors supported the statement: "Ronald Mikos is a human being."

After making all of these findings, the jurors voted unanimously that Mikos be executed for killing Joyce Brannon.

*717 Mikos contests two of the five aggravating factors or considerations: vulnerable victim and lack of remorse. We begin with the first of these, because it is one of the two statutory aggravating factors that the jury found. (The non-statutory aggravating circumstances are less important.) The prosecutor contends that some of Mikos's arguments on sentencing have been forfeited because counsel did not make the appropriate objection at the appropriate time, but we consider

all of the appellate arguments on the merits lest we see them again in the guise of a contention that Mikos received ineffective assistance of counsel, despite the diligent work done on his behalf.

a. Mikos might perhaps have argued that six well-placed bullets will kill anyone, so vulnerability cannot be in issue, but he does not take that line. Brannon was vulnerable, not because she was especially susceptible to bullets, but because she was immobile and could neither run nor fight back when an intruder broke into her apartment. Nor could she seek help in whatever period of consciousness remained to her after the intruder had emptied his gun into her back and neck, piercing her lungs and severing her carotid artery. Both *United States v. Sampson,* 486 F.3d 13, 48-49 (1st Cir.2007), and *United States v. Paul,* 217 F.3d 989, 1001-02 (8th Cir.2000), hold that disabilities making it hard for the victim to resist or flee support a vulnerable-victim finding under § 3592(c)(11).

Our dissenting colleague asserts that Brannon's disabilities are irrelevant because "[s]he could not have outrun [Mikos's] bullets even if she had been an Olympic sprinter" (dissent at 721) and that her doom was sealed once "he was standing behind her" (*id.* at 721). Mikos himself does not contend this-not in the district court, and not in this court. Our colleague's position ignores everything that occurred before Mikos was standing inches from Brannon with a loaded revolver. If Mikos had killed Brannon with a sniper rifle from across the street,

and the first sign of the attack had been a bullet in her head, then her disability would indeed be immaterial. But Mikos instead entered her apartment and walked up to her chair. She was powerless to escape, because she was unable to rise. Even a trained user of handguns has trouble hitting a moving target, so had Brannon been able to run out of her apartment as Mikos entered, she might be alive today. But she could not rise; her physical condition made her a sitting duck. That's why Mikos has never ventured the argument that our dissenting colleague advances. The standards of plain error, see *United States v. Olano*, 507 U.S. 725, 733-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), have not been satisfied. Whether Brannon's obesity contributed to her demise is a factual question, not a legal question for appellate judges, and the evidence permitted a rational jury to find as this jury did.

Instead of opposing the vulnerable-victim factor altogether, Mikos contends that the prosecutor overstepped in one part of his argument to the jury. A medical examiner testified that Brannon bled to death (both internal hemorrhaging and loss from the severed artery) over the course of three or four minutes. In closing argument the prosecutor asked the rhetorical question "What was [Brannon] thinking when she sat there for three to four minutes dying? ... What was she thinking? She couldn't move, she couldn't cry out, she couldn't run, and the reason she couldn't do those things was due to her disability." This was a plea for sympathy, an appeal to emotions rather than

reason, Mikos maintains. Perhaps Brannon fell quickly into unconsciousness, but, even if *718 she did not, the argument goes, a prosecutor should stick to the facts rather than speculate about a victim's mental processes.

"What was she thinking?" is indeed a bad question to have asked, even rhetorically, for the reasons Mikos has articulated. But it is impossible to believe that this brief foray could have affected the jury's verdict. Missteps during closing argument are common, because these arguments are unscripted. They justify a new trial only when they are likely to overwhelm other, appropriate, considerations. See *Darden v. Wainwright*, 477 U.S. 168, 179-83, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Here the jury's attention was focused by judge and counsel alike on the right question: whether Brannon's obesity hindered her ability to resist or flee. The jury's verdict is reliable.

b. Mikos challenges the lack-of-remorse consideration on two fronts. He contends that prosecutorial statements about Mikos's remorse-free demeanor *in court* amount to a penalty for his failure to testify. And he maintains that the evidence did not support this factor. Relying on *United States v. Roman,* 371 F.Supp.2d 36 (D.P.R.2005), he argues that only gloating or boastfulness, after the fashion of Leopold and Loeb, show a meaningful "lack of remorse."

There is a sense in which "lack of remorse" overlaps with "the defendant did not plead guilty", but the

Supreme Court has approved this factor, see *Zant v. Stephens,* 462 U.S. 862, 886 n. 22, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), which differs in principle from a penalty for failure to incriminate oneself. It is common, and acceptable, to give lower sentences to persons who confess and show remorse than to persons who do not; the Sentencing Guidelines institutionalize this with a two-level or three-level reduction for acceptance of responsibility. U.S.S.G. § 3E1.1. Mikos fought every charge every step of the way. That was his right, but in the process he showed no remorse, compared with a person who conceded some culpability (if only on the fraud charges, which were indisputable). If it is proper to take confessions, guilty pleas, and vows to improve one's life into account when deciding whether a murderer should be put to death-and it is unquestionably proper for a judge or jury to do so, see *Williams v. Taylor,* 529 U.S. 362, 398, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)-then it must also be proper for the prosecutor to remind the jury when none of these events has occurred. The consequence of no remorse is built into the Guidelines, see *United States v. Klotz,* 943 F.2d 707 (7th Cir.1991); in a capital case, by contrast, nothing is built in, so what happens automatically as a result of § 3E1.1 must be argued for. The two are equally appropriate.

The prosecutor's main theme was not the absence of a guilty plea, or Mikos's silence (= the lack of an apology) in open court, but the fact that Mikos had not done anything to reduce or redress the hurt his

crimes had caused. He had not, for example, covered the costs of Brannon's burial, leaving these to her family and her church. Instead of taking steps to make good the losses for which he was responsible, Mikos has used his free time in jail to try to swindle the Medicare fund out of more money. He sent off documents asking that payment be made to a differently named entity at a different address, hoping that this would evade administrative orders forbidding payment to the name of his medical practice on file with the bureaucracy. He continued contacting prospective witnesses and attempting to persuade them to keep silent or to tell lies on his behalf. Someone who carries on with crime, even after being caught and imprisoned,***719** can be called remorseless without stretching the term. He is both more dangerous and less capable of incapacitation by imprisonment than is someone who genuinely regrets his misdeeds.

Remorse means regret and contrition. *Roman* surely is right to say that bragging about one's criminal escapades shows lack of remorse, but it is mistaken to say that this is the *only* way to show the absence of remorse. Letting victims bear the loss of crime, while trying to tamper with witnesses to escape conviction and commit more wrongs, also signal lack of remorse, and that demonstration was made here. The jury convicted Mikos of obstructing justice, not just of fraud and murder.

But let us suppose that this is wrong and that lack of remorse has not been made out as a valid non-

statutory aggravating consideration. Lack of remorse is a non-statutory consideration; it did not play a role in making Mikos eligible for the death penalty. The Supreme Court held in *Brown v. Sanders,* 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006), that when an aggravating consideration other than one essential to death-eligibility is set aside, the sentence still may be affirmed if all of the evidence that supported this consideration would have been admitted anyway, or if the court conducts an independent review and concludes that the verdict remains appropriate without the invalid consideration. *Brown* arose on collateral review of a state court's judgment, but most of what *Brown* says concerns how an appellate court should proceed on direct review of a death sentence and hence is equally applicable within the federal system. The Court's opinion in *Jones,* 527 U.S. at 402-05, 119 S.Ct. 2090, arises from direct review of a federal death sentence and reaches a similar conclusion, holding that a federal court of appeals may declare an error concerning an aggravating consideration harmless if the judges are convinced that the jury would have returned the same verdict had the invalid aggravating consideration not been submitted at trial.

Mikos does not contend that the "lack of remorse" consideration put before the jury any evidence that it ought not have received. Most of Mikos's contentions address the prosecutor's closing argument, which came after all of the evidence. The jury was entitled to learn about Mikos's efforts to continue collecting from Medicare (that was

relevant to the substantive charges, and the evidence came in during the trial on the merits) and his efforts to influence witnesses from prison (ditto: this was relevant to several of the substantive counts). Mikos's demeanor in court-whether he was stony-faced or teary-eyed-was already known to the jurors.

So all we have is the prosecutor's argument about lack of remorse. Take away those few pages of transcript, and the weight of evidence remains. Four aggravating factors or considerations are solid. The facts of this cold-blooded execution of a potential witness dominate. Prosecutorial comments about Mikos's demeanor in court and lack of visible remorse strike us, and likely struck the jurors, as gilding the lily. Many a problem in a criminal prosecution is caused by such rhetorical excesses. Prosecutors cannot know what will carry weight with jurors, so they are tempted to try every avenue. When they do, that opens the door to claims of error and appellate second-guessing. That's why the doctrine of harmless error is essential. If error occurred in this penalty proceeding, it was harmless.

AFFIRMED ON ALL SUBJECTS EXCEPT RESTITUTION, WHICH IS REMANDED.

POSNER, Circuit Judge, concurring in part and dissenting in part.

I agree that the defendant's conviction should be upheld and I join that part of *720 the majority opinion. But he is entitled to a new death-penalty hearing. The prosecutor was not content to point

out that the murder was the result of "substantial planning and premeditation to cause the death of a person or commit an act of terrorism," which the Federal Death Penalty Act explicitly allows the jury to deem a factor entitling it to impose the death penalty. 18 U.S.C. § 3592(c)(9). He also argued that the victim "was particularly vulnerable due to old age, youth, or infirmity," another explicit statutory factor, § 3592(c)(11), and that (under the radically unspecific statutory catch-all-"any other aggravating factor [that is, any other factor, besides those specified in the statute, that a jury can treat as a reason for sentencing the defendant to death] for which notice has been given,"§ 3592(c) following (16)) the defendant had shown a lack of remorse for the murder. The prosecutor advanced two other nonstatutory factors as well: that the defendant had killed his victim to prevent her from testifying against him, and that the murder had caused emotional harm to the victim's family and friends; but these add little to the fact that the victim was killed and the murder planned.

The prosecutor's arguments based on victim vulnerability and the defendant's lack of remorse were unsound, and I do not think it is possible to find beyond a reasonable doubt (the applicable standard, 18 U.S.C. § 3595(c)(2)) that the jury would have sentenced the defendant to death even if those arguments had not been made. There is much fussing in the briefs over the defendant's failure to object to the arguments, but that misses the point. Even if there was nothing wrong with the prosecutor's making the arguments, they don't

provide a basis for a finding beyond a reasonable doubt that the victim was vulnerable or that the defendant lacked remorse.

Vulnerability is relative to the nature of the crime. *United States v. Sampson,* 486 F.3d 13, 48-49 (1st Cir.2007). A closeted homosexual is particularly vulnerable to being blackmailed, *United States v. Lallemand,* 989 F.2d 936, 939 (7th Cir.1993); *United States v. Hughes,* 411 F.2d 461, 462-63 (2d Cir.1969), but he is not particularly vulnerable to credit-card fraud. The fact that the victim in this case was a 5-foot 3-inch woman who weighed nearly 300 pounds might have made her particularly vulnerable to solicitations for fraudulent weight-loss programs, to mugging, and to a variety of other crimes, but not to being shot to death in her apartment. In *Sampson,* the victim was fleeing from a knife-wielding assailant and might have escaped had it not been that he had "undergone open-heart surgery (a quintuple bypass) approximately one year prior to his encounter with Sampson; that he was overweight and became short of breath easily; and that he had difficulty walking fifteen feet shortly before his murder." 486 F.3d at 49. In *United States v. Paul,* 217 F.3d 989, 1001-02 (8th Cir.2000), the victim was 83 years old and the court thought he might have escaped or beaten off his attackers had he been younger. This case, in contrast, is like *United States v. Johnson,* 136 F.Supp.2d 553, 560 (W.D.Va.2001), where "the victim was killed instantaneously when the explosive device detonated. Nothing about [her] physical condition

weakened her capacity to resist the fatal blast." See also *Francis v. State,* 808 So.2d 110, 139 (Fla.2001).

It is true that the younger and stronger the intended victim of a shooting, the more likely he is to be able to resist effectively or survive his wounds. But if this argument is pressed hard enough, everyone over 50 would be deemed a vulnerable victim in any case involving the use of force. Vulnerability must be assessed on ***721** the basis of the relation of the victim's condition to the particular circumstances of the crime, *Jones v. United States,* 527 U.S. 373, 401-02, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), as in *United States v. Johnson, supra.*

So although the judge properly instructed the jury that the government had to prove beyond a reasonable doubt that "any infirmity which you find made [the victim] particularly vulnerable must somehow have contributed to her death," see *United States v. Sampson, supra,* 486 F.3d at 34, missing from this case is evidence that the victim's vulnerability did contribute to her death-evidence that a healthier victim might have survived being shot six times in the back at point-blank range or that the defendant would not have tried to kill her had she been healthier because he would have been afraid that she would grab the gun from him. The government lawyer did speculate at the argument in this court that had the victim been of normal weight she might have grabbed the gun from the defendant's grasp, but that is fanciful in the extreme, especially as he was standing behind her.

I do not mean to understate the victim's disability caused by her obesity. She had difficulty getting up from a sitting position and needed canes for walking, and she used a catheter because she had trouble getting to the bathroom in time when she had to urinate. She had rolls of abdominal fat hanging down so low that they were at the level of her knees, and the fat had become infected and had required surgery to save her life from an infection. She had asthma and arthritis and leg cramps and for the accumulation of her ailments took about 15 medications, some of which caused drowsiness and fatigue. Although neither singly nor in combination did her ailments have anything to do with her vulnerability to being shot fatally from behind at close range, the category of nonstatutory aggravating factors is open-ended and the prosecutor could have argued that to kill a person already so afflicted was especially cruel and ugly, like the "brutal and senseless execution style murder of a helpless child" in *Black v. Bell,* 181 F.Supp.2d 832, 863 (M.D.Tenn.2001). There are intimations of such an argument in the prosecutor's closing statement to the jury, but he did not ask the jury to consider this as a factor in aggravation of the defendant's conduct; he relied instead on the statutory factor of vulnerable victim, and that was a mistake; the average person would not have escaped in this case with his life. Having studied the church's schedule, the defendant was able to sneak in when he knew that the victim would be alone. Once he was inside the church with a gun and determined to kill her, her death was

inevitable, no matter what her physical condition. She could not have outrun his bullets even if she had been an Olympic sprinter.

The aggravating factor to which the prosecutor devoted the bulk of his closing argument was lack of remorse. He pointed out that after killing his victim the defendant had continued to engage in the Medicare fraud that had motivated the murder. To deem that a circumstance in aggravation was double counting. The murder was a result of substantial planning and premeditation because it was a means of trying to defeat the fraud prosecution and enable the defendant to continue engaging in fraud. The planning was an aggravating factor that entitled the jury in the exercise of its discretion to sentence him to death, but it was not evidence of a lack of remorse distinct from any inference of remorselessness that one would draw from any murder that had been planned rather than being spontaneous.

***722** The prosecutor told the jury that the defendant is "sitting 20 feet away from you and there's nothing, no remorse whatsoever, because he thinks he got away with it." (An echo of Camus: "And has he uttered a word of regret for his most odious crime? Not one word, gentlemen. Not once in the course of these proceedings did this man show the least contrition." Albert Camus, *The Stranger* 126 (1954 [1944]).) Later the prosecutor added that the defendant is "sorry he got caught, but he's not sorry that he shot [the victim]. The only ramification of that as he's sitting opposite you

right now, nothing else in this man's heart, not a single thing. He has no remorse for what he did." The only inference the jury could have drawn (for it was given no guidance by the judge, who said about remorse only that the government alleged "that defendant has demonstrated a lack of remorse for his criminal conduct"-which might have been taken to mean that it could impose the death penalty because of the defendant's lack of remorse for committing Medicare fraud) was that his failure to confess to the murder in open court showed that he lacked remorse. Had he confessed, however, the jury might still have imposed the death penalty and he would have given away his colorable (though ultimately unsuccessful) claim that the government had failed to prove his guilt beyond a reasonable doubt.

It is true that something like this Hobson's Choice is built into the federal sentencing guidelines for noncapital federal crimes. Ordinarily, to obtain a sentencing discount for accepting responsibility for the crime with which one is charged one has to plead guilty and thus give up the chance to contest guilt. U.S. Sentencing Guidelines § 3E1.1, Application Notes 2, 3; *United States v. Guadagno,* 970 F.2d 214, 226 (7th Cir.1992); *United States v. Escobar-Mejia,* 915 F.2d 1152, 1153 (7th Cir.1990); *United States v. Williams,* 940 F.2d 176, 183 (6th Cir.1991). But there is a difference between a defendant's arguing for leniency on the basis of his admitting to having committed the crime with which he is charged and the government's asking the jury to draw an inference of heinousness from

his failure to admit that. *United States v. Saunders,* 973 F.2d 1354, 1362-63 (7th Cir.1992). In the first case the government is giving (or, *Booker* having demoted the sentencing guidelines to advisory status, recommending that the judge give) the defendant a break in exchange for his sparing the government the expense and uncertainty of a trial. In the second case the judge is asking the jury to infer remorselessness from the defendant's refusal to acknowledge guilt. Yet the motive for that refusal is likely to be simply that the defendant thinks he might be acquitted. You can feel remorse for having committed a crime without wanting to be punished by life in prison or death. A defendant who accepts responsibility for his crime is not denied a sentencing discount for that acceptance on the theory that if he were really contrite he wouldn't be seeking a lighter sentence-he would reject the acceptance discount.

One could imagine a legislature's dissolving the difference between a punishment increase for proving lack of remorse and the denial of a punishment decrease for failing to prove remorse by deeming failure to prove remorse (a mitigating factor) proof of lack of remorse (an aggravating factor). But Congress has not done that. The Federal Death Penalty Act requires proof of an aggravating factor beyond a reasonable doubt, but proof of a mitigating factor by a mere preponderance of the evidence. As the Supreme Court explained in *McMillan v. Pennsylvania,* 477 U.S. 79, 100-01, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (citations omitted), "the distinction between

aggravating and mitigating*723 facts has been criticized as formalistic. But its ability to identify genuine constitutional threats depends on nothing more than the continued functioning of the democratic process. To appreciate the difference between aggravating and mitigating circumstances, it is important to remember that although States may reach the same destination either by criminalizing conduct and allowing an affirmative defense, or by prohibiting lesser conduct and enhancing the penalty, legislation proceeding along these two paths is very different even if it might theoretically achieve the same result. Consider, for example, a statute making presence 'in any private or public place' a 'felony punishable by up to five years imprisonment' and yet allowing 'an affirmative defense for the defendant to prove, to a preponderance of the evidence, that he was not robbing a bank.' No democratically elected legislature would enact such a law."

What would demonstrate a lack of remorse would be statements (such as bragging about the murder), gestures, laughter as the murder was described or a grieving relative testified, or facial expressions that indicated that the defendant had indeed no regret about having committed the murder. And thus in *Emmett v. Kelly*, 474 F.3d 154, 170 (4th Cir.2007), "when questioned about the circumstances leading up to the murder, Emmett told the police that [his victim] was 'an asshole' who 'wouldn't loan me no money,' and that it 'just seemed right at the time,' demonstrating a lack of remorse and callous disregard for human life

similar to that demonstrated in the wake of his killing of the motorcyclist a few years prior." See also *Thomas v. Gilmore,* 144 F.3d 513, 514 (7th Cir.1998); *Coble v. Quarterman* 496 F.3d 430, 438 (5th Cir.2007); *United States v. Roman,* 371 F.Supp.2d 36, 48, 50-51 (D.P.R.2005).

Mere silence is not enough to demonstrate lack of remorse. Nor failure to take extraordinary efforts to demonstrate remorse, such as paying for the victim's funeral expenses. Such a failure might defeat the defendant's effort to plead remorse as a mitigating factor; but the absence of a mitigating factor cannot automatically be converted to the presence of an aggravating one.

Psychologists who set out to study lack of remorse among prisoners proceeded as follows: "Lack of remorse was operationalized as either (a) a negative answer to a question concerning whether the respondent ever regretted having destroyed or stolen property, or mistreated or harmed another person, or wished these major violations of the rights of others had never happened; or (b) an affirmative answer to a question concerning whether the respondent felt he or she had the right to do the behavior(s), or that the people affected by the behavior(s) deserved what they got." Risë B. Goldstein, et al., "Lack of Remorse in Antisocial Personality Disorder: Sociodemographic Correlates, Symptomatic Presentation, and Comorbidity With Axis I and Axis II Disorders in the National Epidemiologic Survey on Alcohol and Related Conditions," 47 *Comprehensive Psychiatry* 289, 291

(2006); see also Martha Grace Duncan, " 'So Young and So Untender': Remorseless Children and the Expectations of the Law," 102 *Colum. L.Rev.* 1469, 1491-92 (2002). No effort to do that was made in this case. It would have helped had the prosecutor or the judge (or for that matter the defendant's lawyer) told the jury what "remorse" means and how its presence or absence can be determined. They did not.

Not every premeditated murderer is sentenced to death, see, e.g., *Carmichael v. State,* 340 Ark. 598, 12 S.W.3d 225 (2000); ***724***Schoels v. State,* 114 Nev. 981, 966 P.2d 735 (1998); *People v. Poindexter,* 144 Cal.App.4th 572, 50 Cal.Rptr.3d 489 (2006)-quite the contrary. The force of 18 U.S.C. § 3592(c)(9) is not in the word "premeditation" but in the phrase "substantial planning"-yet not all murderers who plan their murders well in advance are sentenced to death either. See, e.g., *United States v. Russell,* 971 F.2d 1098, 1103-04 (4th Cir.1992); *People v. St. Joseph,* 226 Cal.App.3d 289, 276 Cal.Rptr. 498, 500-01 (1990). Without the aggravating factors found by the jury in this case, it is uncertain whether the defendant would have been sentenced to death. In one study, 39.8 percent of jurors in capital cases said that a lack of remorse either made them or would have made them more likely to vote to impose the death penalty. Stephen P. Garvey, "Aggravation and Mitigation in Capital Cases: What Do Jurors Think?," 98 *Colum. L.Rev.* 1538, 1560-61 (1998). A study by Theodore Eisenberg *et al.*,"But Was He Sorry? The Role of Remorse in

Capital Sentencing," 83 *Cornell L.Rev.* 1599, 1633 (1998), found that lack of remorse was the third most powerful aggravating factor in capital sentencing. See also Scott E. Sundby, "The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty," 83 *Cornell L.Rev.* 1557, 1560 (1998); William S. Geimer & Jonathan Amsterdam, "Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases," 15 *Am. J.Crim. L.* 1, 40-41 (1987-1988). "In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Riggins v. Nevada,* 504 U.S. 127, 144, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (concurring opinion).

C.A.7 (Ill.),2008.
U.S. v. Mikos
539 F.3d 706, Med & Med GD (CCH) P 302,605

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

United States of America,	)	
	)	
Plaintiff	)	**No. 02cr 137-1**
	)	
v.	)	**Judge Ronald A.**
	)	**Guzmán**
Ronald Mikos,	)	
Defendant	)	

ORDER

Defendant's *Ex Parte*, under Seal Motion for Authorization to Obtain and for Payment for Expert Services of David LaMagna is denied without prejudice. The motion contains no explanation as to the need for an out-of-town expert in the area of ballistics and tool mark identification. The court invites a supplemental filing indicating the extent to which, if any, counsel has sought expert witnesses in these areas In the Northern District of Illinois before the court will consider appointing an expert which will require the extra expenditure of funds for travel and related expenses.

SO ORDERED **ENTERED: 4/22/03**

RONALD A. GUZMÁN
United States Judge

Appendix C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 17, 2008

Before

FRANK H. EASTERBROOK, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

United States of America *Plaintiff-Appellee,*		Appeal from the United States District Court for The Northern District of Illinois, Eastern Division.
Nos. 06-2375, 06-2376 & 06-2421	v.	
Ronald Mikos, *Defendant-Appellant.*		No. 02 CR 137 Ronald A. Guzmán *Judge*

Order

Defendant-appellant filed a petition for rehearing and rehearing en banc on September 22, 2008. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Appendix D

Constitution of the United States

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code
Title 18. Crimes and Criminal Procedure
Part II. Criminal Procedure
Chapter 228. Death Sentence

§ 3599. Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either--

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other

reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing,

motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

(g)(1) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. The Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to

section 5305 of title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year, up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

(2) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(3) The amounts paid under this paragraph for services in any case shall be disclosed to the public, after the disposition of the petition.

United States Code
Title 18. Crimes and Criminal Procedure
Part II. Criminal Procedure
Chapter 201. General Provisions

§ 3006A

(e) Services other than counsel.--

(1) Upon request.--Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request.--(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $500 and expenses reasonably incurred.

(B) The court, or the United States magistrate judge (if the services were rendered in a case disposed of entirely before the United States magistrate judge), may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $500.

(3) **Maximum amounts.**--Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $1,600, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(4) **Disclosure of fees.**--The amounts paid under this subsection for services in any case shall be made available to the public.

Appendix E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

RONALD MIKOS,

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
No. 02-CR-137-1—**Ronald A. Guzman**, *Judge*

JOHN BEAL,
Defendant's Attorney

THERE WAS A:

jury verdict of guilty as to counts One through Twenty-Five of the SUPERSEDING Indictment.

All remaining counts are dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §1341	Mail Fraud		1s through 14s
18 U.S.C. §1347	Health Care Fraud		15s through 19s
18 U.S.C. §1505	Obstruction of Proceedings		20s
18 U.S.C. §1503	Influencing a Grand Jury		21s
18 U.S.C. §1512(b)(1)	Tampering With a Witness		22s through 24s
18 U.S.C. §1512(a)(1)(A)	Murder of a Witness		25s

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

As to Counts 1s through 14s and Count 20s, the defendant is hereby committed to the custody of the

United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **SIXTY (60 MONTHS)** on each count to run concurrently.

As to Counts 15s through 19s and Count 21s through 24s, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **SEVENTY-EIGHT (78) MONTHS** to run concurrently with each other and with the terms of imprisonment on Counts 1s through 14s and 20s. For a total period of imprisonment of seventy-eight (78) months.

As to Count 25s, the defendant is sentenced to **DEATH**. The defendant is hereby committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and review of sentence. When the sentence is to be implemented, the defendant shall be released to the custody of a United States Marshal, who shall supervise the implementation of the sentence in the manner prescribed by the death penalty law of the State of Illinois.

SUPERVISED RELEASE

If the defendant should be released from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

> The defendant is sentenced on all counts of conviction, namely, Counts 1s through 24s to a period of Three (3)

years of Supervised Release, said periods to run concurrent.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(As set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance, up to a maximum of 104 tests per year as directed by the Probation Office.

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of

such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation

officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic

urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the

defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	**Mandatory Costs of Prosecution**
$2,500.00	Fine Waived	$1,800,000.00	**$**

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special

assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Restitution is ordered in the amount of $1,800,000.00.

Restitution to be paid as listed below.

Name of victim entitled to restitution (mailing address noted for public entitles only)	**Restitution Ordered**	**Priority**
Medicare DHHS-CMS Division of Accounting Mailstop C - 30927 75 Security Boulevard Baltimore, Maryland 21244-1805	$1,800,000.00	

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority payment column above. Pursuant to 18 U.S.C. § 3664(i), all non-federal victims shall be paid in full prior to the United States receiving payment. Pursuant to 18 U.S.C. § 3664(j), if a victim has received compensation from insurance or any other source with respect to a loss, restitution shall be paid to the person who provided or is obligated to provide the compensation. All restitution to victims required by the order shall be paid to the victims before any restitution is paid to such a provider of compensation.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

- Pursuant to 18 U.S.C. §§ 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of

judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:

In full:

Defendant shall pay restitution in the amount of ten per cent of his monthly income.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

RETURN OF SERVICE

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____

By: _____
(Signature)

Name (Print) _____

Title (Print) _____

The defendant is immediately remanded to the custody of the United States Marshal.

Date of Imposition of Judgment/Sentencing: April 27, 2006

/ s/ Ronald A. Guzmán
RONALD A. GUZMAN
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 5th day of May, 2006

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CR 137

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

RONALD MIKOS,
Defendant.

Chicago, Illinois April 19, 2005 9:30 a.m.

VOLUME V
REPORT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE RONALD A. GUZMAN, and a Jury.

For the Plaintiff:	HON. PATRICK J. FITZGERALD, United States Attorney,
	BY: MR. JEFFREY H. CRAMER
	MR. JOHN C. KOCORAS
For the Defendant:	MR. JOHN M. BEAL
	MS. CYNTHIA GIACCHETTI
Official Court Reporter:	Geraldine D. Monahan

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offices. They tried to figure out where his cell phone was hitting, and they searched different parks. They searched trash cans. Any place he was they searched. They couldn't find it. And the reason they couldn't find it, Ladies and Gentlemen, the only possible explanation for this gun being missing is because he doesn't want it b[r]ought in here.

MS. GIACCHETTI: Objection, your Honor.

THE COURT: Basis?

MS. GIACCHETTI: Defendant's constitutional right not to testify, not to answer, not to present a defense, not to explain.

THE COURT: I'll overrule that objection. I will, however, sustain the objection as to argument. Please don't argue.

MR. CRAMER: Yes, Judge.

Ladies and Gentlemen, you will learn that there is only one reasonable explanation for that gun being missing and that's because, frankly, he didn't want it found. Because they searched everywhere, and we will convince you of that because we will show you the evidence.

One more thing and then I'm going to sit down. The Judge already went through some of the legal terms that you should be familiar with, and the indictment goes into 25 counts, and we're going to try to present the case in the order of the indictment. But, as the Judge indicated, with some of the

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CR 137

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

RONALD MIKOS,
Defendant.

Chicago, Illinois May 4, 2005 9:30 o'clock a.m.

VOLUME XIV
REPORT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE RONALD A. GUZMAN, and a Jury.

For the Plaintiff:	HON. PATRICK J. FITZGERALD, United States Attorney, BY: MR. JEFFREY H. CRAMER MR. JOHN C. KOCORAS
For the Defendant:	MR. JOHN M. BEAL MS. CYNTHIA GIACCHETTI
Official Court Reporter:	Geraldine D. Monahan

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a .22-caliber revolver on January 24th, and it's gone.

And she is right when he says that the defendant[] does not have to tell you where that gun is. He doesn't have to say a word. He does not have to tell you where that gun is. But this is not a game of hide-and-go-seek. And he had two-day headstart on this agent. Did he you use the book to hide it or did he just throw it in Lake Michigan?

They searched -- the scuba team went in one area. That gun could be anywhere. Not a clue where it is.

But I'll tell you, not for a lack of trying. It's not for a lack of trying, ladies and gentlemen. They searched everywhere. They searched where he lived, where he used to live, his office, his old office. They searched trash cans in

14 park districts, they searched lean-to's, they searched cabins in

15 park districts. They searched places that a gun reasonably and,

16 frankly, unreasonably could be. Why would that gun end up in

17 some sort of trash can in the Northbrook park district?

18 Ridiculous. But they searched there because he hit cell towers,

19 he had cell hits around there.

20 They went under water with the scuba team. They went

21 on rooftops. You remember Agent Schomer? They went on land.

22 And even -- remember Agent Schomer? They went with the GPS site

23 north of this map and dug.

24 They looked anywhere for that gun, anywhere that gun

25 could reasonably be.

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1 Now ask yourself the extension of the argument, ladies

2 and gentlemen, if the gun is not where it reasonably could be,

3 why is it gone?

You see this chart. I'm going to show it to you one more time because, frankly, it's crucial. It's all there. It's all there down to the bullet.

Where is that gun? Why is that gun not there. There is only one reasonable explanation. There were many unreasonable explanations, but one reasonable explanation, which is the only thing we're here about. It's gone because he wants it gone. And there's only one reason why a man would want to get rid of a .22-caliber revolver, and that's because he just shot somebody. It makes no sense otherwise for that gun to be missing, none.

Miss Giacchetti said -- and this one is circular, because he couldn't have done it based -- ladies and gentlemen, the argument was, you cannot convict him because there is evidence that he did it. That's essentially it, and here's why

I say that.

You cannot convict him, is the argument, because he left the note and the bullets in the car. That's what we got before March. You cannot convict him because of the note and the bullets in the car, and if he was smart enough to get rid of the gun, he would have gotten rid of the notes and the bullet.

That was the argument.

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 02 CR 137

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

RONALD MIKOS,
Defendant.

Chicago, Illinois May 18, 2005 9:00 o'clock a.m.

VOLUME XXIII
REPORT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE RONALD A. GUZMAN, and a Jury.

For the Plaintiff:	HON. PATRICK J. FITZGERALD, United States Attorney, BY: MR. JEFFREY H. CRAMER MR. JOHN C. KOCORAS
For the Defendant:	MR. JOHN M. BEAL MS. CYNTHIA GIACCHETTI
Official Court Reporter:	Geraldine D. Monahan

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That was the testimony we heard from Agent Reyes and the cross-examination of Stacey Rosenfeld.

On February 22, 2002, he submits this letter, which you saw through the cross-examination. He's in jail for over two weeks and he's still committing a fraud. It's amazing.

He's in jail and he's still committing a fraud, trying to get money from a different carrier.

He kills Joyce Brannon. He gets away with it. We know he gets away with it, at least he thinks so based upon the phone call from February 4, but he's still continuing the fraud.

Nothing. He's sitting 20 feet away from you and there's nothing, no remorse whatsoever, because he thinks he got away with it.

From Dodge County he's calling the other

beneficiaries. He's still in jail and he's reaching out to the
beneficiaries to find out what's going on with the case. He
talks to Stacey Rosenfeld; he's concerned about the Medicare
fraud, not concerned about the death or the shooting of Joyce
Brannon.

He's probably sorry that he forgot the bullets and the
casing and the note in the car. I can pretty much guarantee you
that. He's sorry he forgot that. Chances are, he wishes that
Joyce Brannon didn't talk to Barbara Littwin or her sister after
the phone call on the 24th. He's sorry that the FBI found out
about the Skokie guns and found O'Brien and Siemiawski.

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He has regrets that Charles Lobosco decided to
cooperate and testify against him, and Jean Kalish. And he's

sorry he got caught, but he's not sorry that he shot Joyce Brannon. The only ramification of that as he's sitting opposite you right now, nothing else in this man's heart, not a single thing. He has no remorse for what he did. He's sorry he got caught. He's certainly sorry he got convicted.

That is the last nonstatutory aggravating factor and the last aggravating factor. There's five of them, two statutory, which you need to find at least one to move on to the next step, and then three nonstatutory. And once you have that framework, if you will, for the aggravating factors, you move on to the mitigating factors.

And the aggravating factors amount to such an overwhelming argument, an overwhelming argument, that when you compare them to the mitigating factors, however many you found,

and we'll get to that in a moment, you are still left with the bottom line that this is the case.

There are 56 mitigating factors. Now, these are not from the statute; this is essentially a laundry list from defense counsel. And, in fairness, I put up the aggravating factors. I'm not going to put them all up because I don't have that kind of time, but I'm going to go through some of them.

And you'll have these pieces of paper with you.

The mitigating factors, the first page has 11. And

(2)

AUG 17

No. 08-1280

In the Supreme Court of the United States

RONALD MIKOS, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecutor, in his rebuttal argument to the jury during the guilt phase of petitioner's trial, improperly commented on petitioner's failure to testify.

2. Whether the district court abused its discretion by denying petitioner's motion for leave to hire at public expense his ballistics expert of choice because the expert's fee would have exceeded the presumptive statutory limit of $7500, with the result that petitioner was required to hire another ballistics expert.

3. Whether the prosecutor's closing argument discussing petitioner's lack of remorse, during the penalty phase of petitioner's trial, improperly commented on petitioner's failure to testify and constituted reversible plain error.

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In the Supreme Court of the United States

No. 08-1280

RONALD MIKOS, PETITIONER

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UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 539 F.3d 706.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2008. A petition for rehearing was denied on November 17, 2008 (Pet. App. 42a). On January 23, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 16, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of murdering a witness with intent to prevent her from testifying at a grand jury proceeding, in violation of 18 U.S.C. 1512(a)(1)(A); 14 counts of mail fraud, in violation of 18 U.S.C. 1341; five counts of health care fraud, in violation of 18 U.S.C. 1347; one count of obstructing justice, in violation of 18 U.S.C. 1503; one count of attempting to influence a grand jury, in violation of 18 U.S.C. 1505; and three counts of witness tampering, in violation of 18 U.S.C. 1512(b)(1). He was sentenced to death on the murder count, to a total of 78 months of imprisonment on the other counts, and to pay restitution in the amount of $1.8 million. The court of appeals vacated the restitution order and affirmed in all other respects. Pet. App. 1a-40a.

1. Petitioner was a podiatrist who performed only routine procedures, such as trimming the toenails of people unable to clip their own, that were not covered by Medicare. Yet petitioner billed Medicare for thousands of surgeries. After the authorities became suspicious, petitioner arranged for some of his elderly patients, many of whom were not mentally competent, to submit affidavits stating that he had performed surgery on them. When some patients declined to do so, petitioner prepared affidavits for them and had their signatures forged. He visited seven patients who had received grand jury subpoenas in order to dissuade them from testifying. None of those patients appeared to testify, whether because of petitioner's actions or because of their own mental or physical limitations. Pet. App. 1a-2a.

One of petitioner's patients, Joyce Brannon, cooperated with the authorities and was subpoenaed to testify before the grand jury. Brannon was partially disabled, walking with canes due to arthritis and obesity. Gov't C.A. Br. 11-12.

On January 27, 2002, four days before she was to testify, Brannon was shot to death in her basement apartment in the church where she worked as a secretary. She was shot six times; the bullets were .22-caliber, brass-coated rounds fired from long-rifle, rim-fire cartridges. The lack of shell casings led the police to believe that the killer had used a revolver, which does not eject spent cartridges after firing. Brannon's valuables were undisturbed, and there was no sign of robbery. Pet. App. 2a; Gov't C.A. Br. 11-12, 15-16.

Three weeks before Brannon's murder, the police in Skokie, Illinois, had been called to the house of one of petitioner's four girlfriends, where they discovered that petitioner kept multiple firearms and ammunition. Because petitioner could not produce a current firearm owner's identification card, the police confiscated the guns and ammunition and gave petitioner a detailed inventory. After renewing his firearm owner's card, petitioner retrieved the guns and ammunition. Pet. App. 3a; Gov't C.A. Br. 9-10 & n.3.

Following the murder, the police searched the storage unit to which petitioner had transferred the guns and found every firearm and round of ammunition on the inventory—except for one .22-caliber Herbert Schmidt revolver. They also found an empty leather holster. Despite an extensive search of homes, offices, forest preserves, and the waters of Lake Michigan, that revolver was never found. A search of petitioner's car turned up a box of Remington .22-caliber, brass-coated, long-rifle,

rim-fire rounds consistent with the bullets that had been used in the murder. Twenty shells were missing from the box. The car also contained one spent .22-caliber casing, consistent with the 80 unfired rounds, on which the firing pin had left a hemispherical mark. A government expert test-fired another Herbert Schmidt .22-caliber long-rifle revolver, which left a similar hemispherical mark on spent casings. Pet. App. 3a; Gov't C.A. Br. 11, 16-17.

A member of the staff of the church where Brannon lived saw petitioner or someone who looked like him in the church a week before the murder. The witness described the person's hair as gray. Although petitioner does not have gray hair, the police found a bottle of gray hair coloring in his car. The car also contained handwritten details of the church's schedule. The details revealed when a person could enter Brannon's apartment without being seen. Data on petitioner's smart phone showed that he placed and received calls that went through cell towers near the church at approximately the time that petitioner was identified as being in the church the week before the murder, and again one or two days before the murder. Pet. App. 3a-4a.

2. Before trial, petitioner sought funds to retain David LaMagna, an expert on ballistics and firearm toolmarks who lived in Massachusetts. Pet. App. 11a; Gov't C.A. Br. 40; see also 18 U.S.C. 3599(f) and (g)(2) (formerly 21 U.S.C. 848(q)(9) and (10)(b) (2000)) (authorizing federal funding for expert services for federal capital defendants). The district court denied the motion "without prejudice." Pet. App. 41a. The court observed that petitioner had not presented any "explanation as to the need for an out-of-town expert," who would bill for "travel and related expenses," in that subject area. *Ibid.*

The court, however, "invite[d] a supplemental filing indicating the extent to which, if any, counsel has sought expert witnesses in these areas [i]n the Northern District of Illinois." *Ibid.*

Petitioner made no supplemental filing. Instead, petitioner sought authorization to hire John Nixon, a local expert. The district court granted that motion. Nixon examined the ballistics and toolmarks evidence, over several days, at his laboratory in Indiana, and he prepared an expert report concerning the evidence. Pet. App. 11a; Def.'s Mot. for Extension of Time for Filing of Report of Ballistics & Toolmarks Expert (Sept. 1, 2004). Petitioner ultimately did not call Nixon as a witness at trial.

The jury found petitioner guilty on all counts of the indictment.

3. After the verdicts, the district court conducted a separate hearing, pursuant to the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, to determine petitioner's sentence on the murder count. Under the FDPA, before the jury may sentence a defendant to death, it must find the existence of at least one of the "intent" factors enumerated in 18 U.S.C. 3591(a)(2) to ensure that the defendant acted with the degree of culpability sufficient to justify the imposition of the death penalty. See 18 U.S.C. 3591(a). In addition, the jury must find the existence of at least one statutory aggravating factor enumerated in 18 U.S.C. 3592(c). If the jury finds that those requirements are satisfied, then it may consider any non-statutory aggravating factors for which notice has been given, and it must weigh all aggravating factors it has found against all mitigating factors that any individual juror has found to exist. See 18 U.S.C. 3593(c) and (d). The jury is to impose the death

penalty if it concludes that all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify a sentence of death. 18 U.S.C. 3593(e).

In this case, the jury found unanimously that the government had proved beyond a reasonable doubt all five statutory and non-statutory aggravating factors submitted to it: that petitioner committed the murder following substantial planning and premeditation, see 18 U.S.C. 3592(c)(9); that Joyce Brannon was vulnerable because of her infirmity, see 18 U.S.C. 3592(c)(11); that petitioner committed the murder to prevent Brannon's cooperation in the Medicare-fraud investigation; that the crime caused loss to Brannon's friends, family, and co-workers; and that petitioner had demonstrated a lack of remorse for the murder. Pet. App. 21a. Various jurors found some of the mitigating factors submitted by the defense. The jury then concluded unanimously that the aggravating factors found to exist sufficiently outweighed the mitigating factors found to exist to justify a death sentence. *Id.* at 21a-22a.

4. The court of appeals affirmed. Pet. App. 1a-40a.

a. The court of appeals rejected petitioner's contention that, during the summation in the guilt phase of the trial, the prosecutor improperly commented on petitioner's failure to testify by asking the jury to infer guilt from the fact that the Herbert Schmidt revolver was missing. The court of appeals concluded that the prosecutor had asked the jury to infer guilt not from petitioner's silence, but from his conduct in hiding the gun. Pet. App. 6a-7a. The court explained that "[i]t is entirely appropriate to draw an inference from the facts that (a) [petitioner] owned a particular weapon, (b) the weapon could have inflicted the fatal wounds, and (c) the

weapon vanished at about the time of the murder, even though other weapons known to have been in the same place are accounted for." *Ibid.*

b. The court of appeals also rejected as "a dud" petitioner's argument that the district court should have allowed him to hire the higher-priced LaMagna as his ballistics expert instead of the local expert Nixon. Pet. App. 11a; see *id.* at 11a-13a. The court observed that petitioner had not told the court "what LaMagna could have done that Nixon was unable to do," or "why he did not use Nixon as an expert" at trial. *Id.* at 12a. The court added that "[j]ust as a defendant who relies on counsel at public expense must accept a competent lawyer rather than Clarence Darrow, so a defendant who relies on public funds for expert assistance must be satisfied with a competent expert." *Ibid.* (citation omitted). The court then noted that petitioner had not argued that Nixon was not competent. *Ibid.*

c. The court of appeals also rejected petitioner's challenge to his sentence, by a divided vote. Petitioner challenged two of the five aggravating factors, only one of which (the lack of remorse) is relevant here. The prosecutor had referred in court to petitioner's demeanor as showing his lack of remorse, and petitioner contended that the comments amounted to a penalty for his failure to testify. The court of appeals stated that "[t]here is a sense in which 'lack of remorse' overlaps with 'the defendant did not plead guilty.'" Pet. App. 25a. But the court of appeals noted that this Court had approved the factor, "which differs in principle from a penalty for failure to incriminate oneself." *Id.* at. 26a (citing *Zant* v. *Stephens*, 462 U.S. 862, 886 n.22 (1983)). The court explained that "[i]f it is proper to take confessions, guilty pleas, and vows to improve one's life into

account in deciding whether a murderer should be put to death—and it is unquestionably proper for a judge or jury to do so—then it must also be proper for the prosecutor to remind the jury when none of these events has occurred." *Ibid.* (citation omitted). The court observed that the lack-of-remorse factor, which is "built into the [Sentencing] Guidelines" for purposes of non-capital cases, is "equally appropriate" in the death-penalty context. *Ibid.*

Further, the court of appeals determined that "[t]he prosecutor's main theme was not the absence of a guilty plea, or [petitioner's] silence * * * in open court, but the fact that [petitioner] had not done anything to reduce or redress the hurt his crimes had caused." Pet. App. 26a-27a. The court explained that, "[i]nstead of taking steps to make good the losses for which he was responsible," such as by covering the costs of Brannon's funeral, petitioner had used his time in jail to try to defraud Medicare out of more money and to try to persuade prospective witnesses to remain silent or to lie in his behalf. *Id.* at 27a. The court concluded that "[s]omeone who carries on with crime, even after being caught and imprisoned, can be called remorseless without stretching the term." *Ibid.*

The court added that, even if the lack-of-remorse factor were defective, any error would be harmless. Pet. App. 27a-29a.[1] The statutory aggravating factor of premeditation was sufficient to establish petitioner's eligibility for the death penalty. See 18 U.S.C. 3592(c)(9). The court explained that "when an aggravating consideration other than one essential to death-eligibility is set

[1] Petitioner acknowledged that this claim could be reviewed only for plain error. Pet. C.A. Br. 41-42. The court of appeals opted to address the claim on the merits, as it discerned no error. Pet. App. 22a-23a.

aside, the sentence still may be affirmed if all of the evidence that supported this consideration would have been admitted anyway, or if the court conducts an independent review and concludes that the verdict remains appropriate without the invalid consideration." Pet. App. 28a. The court noted that petitioner did not contend that the lack-of-remorse consideration put before the jury any evidence that it should not have received. *Ibid.* The court further stated that, in light of the remaining aggravating factors and the facts surrounding "this cold-blooded execution of a potential witness," the prosecutor's comments about petitioner's in-court demeanor and lack of visible remorse struck it, and "likely struck the jurors," as "gilding the lily." *Id.* at 29a.

5. Judge Posner concurred in the affirmance of the convictions but dissented from the affirmance of the death sentence. Pet. App. 29a-40a. In Judge Posner's view, the vulnerable-victim aggravating factor (which petitioner does not challenge in this Court) was defective because the evidence failed to establish that Brannon's infirmities did not establish that she was vulnerable to being fatally shot. *Id.* at 31a-34a. In addition, Judge Posner concluded that the lack-of-remorse factor was not established because neither "[m]ere silence" nor the failure to take "extraordinary efforts" to show remorse is sufficient to demonstrate lack of remorse. *Id.* at 38a. In Judge Posner's view, while "[s]uch a failure might defeat the defendant's effort to plead remorse as a mitigating factor[,] * * * the absence of a mitigating factor cannot automatically be converted to the presence of an aggravating one." *Ibid.* Finally, Judge Posner concluded that, without the two aggravating factors he believed to be invalid, it is "uncertain" whether the jury would have voted for the death penalty. *Id.* at 39a.

(Judge Posner thought that the parties' agreement on the plain-error standard of review, see note 1, *supra*, was "fussing" that "misse[d] the point." Pet. App. 30a.)

ARGUMENT

1. Petitioner renews his contention (Pet. 10-13) that, in his rebuttal argument to the jury during the guilt phase, the prosecutor improperly commented on his failure to testify. The court of appeals correctly rejected this claim, and it does not warrant this Court's review.

In his closing argument, the prosecutor observed that, of all the firearms that petitioner had retrieved from the authorities and then placed in the storage unit, the Herbert Schmidt revolver was the only one that was missing. 5/4/2005 Tr. 2803. The prosecutor continued: "It wasn't misplaced. It wasn't lost. He didn't want law enforcement to find it and he didn't want you to hear about it." *Id.* at 2803-2804. Petitioner responded, in his closing argument, that although it was not his burden to prove anything, the gun could have been stolen from the trunk of his car, which did not lock securely. *Id.* at 2846-2848. Then, in rebuttal, after acknowledging that petitioner did not have to "say a word" about where the gun was, the prosecutor stated, "[b]ut this is not a game of hide-and-go-seek. And he had [a] two-day head start on this agent." Pet. App. 66a. The prosecutor added: "Where is that gun? Why is that gun not there[?] There is only one reasonable explanation. There were many unreasonable explanations, but one reasonable explanation, which is the only thing we're here about. It's gone because he wants it gone." *Id.* at 68a. Petitioner argues that the prosecutor improperly commented on his failure to testify by "highlight[ing] for the jury the fact that [he] did not 'say a word' and invit[ing] the jury to punish

him for 'hid[ing].'" Pet. 12 (final pair of brackets in original).

a. In *Griffin* v. *California*, 380 U.S. 609 (1965), this Court held that the Self-Incrimination Clause of the Fifth Amendment bars a judge or prosecutor from asking a jury to infer guilt from a defendant's failure to testify. Nor may a prosecutor, consistent with the Fifth Amendment privilege, refer *indirectly* to a defendant's failure to testify. Thus, a prosecutor's statement that the government's evidence is "uncontradicted," "unrebutted," or "undisputed" is improper if the only person who could have contradicted, rebutted, or disputed the government's evidence was the defendant himself. See, *e.g.*, *United States* v. *Cotnam*, 88 F.3d 487, 497 (7th Cir.), cert. denied, 519 U.S. 942 (1996).

The prosecutor did not comment adversely on petitioner's failure to testify, either directly or indirectly. As the court of appeals explained, the prosecutor did not ask the jury to draw an inference of guilt from petitioner's silence; rather, he asked it to draw such an inference from the disappearance of the gun. Pet. App. 7a. The prosecutor, like defense counsel in his closing argument, reminded the jury that petitioner did not have to testify, and he made no attempt to exploit defendant's choice not to do so. Contrary to petitioner, the reference to "a game of hide-and-go-seek" concerned petitioner's *conduct* in hiding the gun, not his failure to testify, as is made clear from the prosecutor's next sentence: "And [petitioner] had [a] two-day head start on this agent." *Id.* at 66a. Neither *Griffin* nor the cases that follow it bar a prosecutor from urging a jury to draw inferences from evidence of events merely because the defendant declines to take the stand to explain the events himself. The decision of the court of appeals

therefore does not contravene any precedent of this Court.[2]

Nor does the decision below create any circuit conflict warranting this Court's review. Petitioner takes issue (Pet. 10-11) with a test for applying the *Griffin* rule that the Seventh Circuit has employed in some other cases. That test inquires whether "1) it was the prosecutor's manifest intention to refer to the defendant's silence, or 2) the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's silence." *Cotnam*, 88 F.3d at 497 (citations omitted). But petitioner himself relied on that test in the court of appeals. See Pet. C.A. Br. 9-10. In any event, whatever the merit of the test, the court below did not invoke it or rely on any decision that did so. Further, petitioner is incorrect in asserting (Pet. 11) that the court below "looked only to the prosecutor's intent" and did not consider the impact of the

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[2] Petitioner also relies (Pet. 11) on several decisions of this Court that do not address the issue relevant here. In *Portuondo* v. *Agard*, 529 U.S. 61 (2000), the Court held that it was not unconstitutional for the prosecutor to call the jury's attention to the fact that the defendant had the opportunity to hear the other witnesses and to tailor his testimony accordingly. The Court rejected the defendant's reliance on *Griffin*, which it characterized as "prohibit[ing] comments that suggest a defendant's silence is 'evidence of *guilt*.'" *Id.* at 69 (quoting *Griffin*, 380 U.S. at 615) (emphasis in *Agard*). In *United States* v. *Hasting*, 461 U.S. 499 (1983), the issue was not whether *Griffin* error had occurred, but whether, in the exercise of its supervisory power, a federal court may decline to consider whether such an error was harmless. *Id.* at 505, 510-512. Finally, in *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), the Court held that the *Griffin* rule, which it described as "prohibit[ing] the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt," *id.* at 319, does not apply in the context of prison disciplinary proceedings, which are civil in nature, *id.* at 316-320.

prosecutor's remarks on the jury. Rather, the court's decision rested on its own "read[ing]" of the prosecutor's comments. Pet. App. 7a. Nothing in the opinion suggests that, in applying *Griffin*, courts should focus solely —or at all—on the prosecutor's intent.

2. Petitioner also renews his contention (Pet. 13-18) that the district court erred in denying his motion to hire ballistics expert LaMagna at public expense. That claim lacks merit.

Indigent federal capital defendants are entitled to retain experts whose services are "reasonably necessary" to the defense, subject to a presumptive cap (which the district court may set aside) of $7500 per case. 18 U.S.C. 3599(f) and (g)(2). That statute implements the due process requirement that the government assist indigent defendants in paying for necessary expert services. See *Ake* v. *Oklahoma*, 470 U.S. 68, 83 (1985).

In this case, the district court agreed with petitioner that the services of a ballistics expert were "reasonably necessary" for his defense. But it denied petitioner's motion to hire LaMagna, "without prejudice," because LaMagna's fee would have exceeded the statutory limit of $7500, in a case in which the defense required (and was provided with) numerous different experts. Pet. App. 41a. Instead, the court told petitioner that he could hire at public expense a local ballistics expert whose rates or travel expenses would be lower, *or* make a further, particularized showing that he had tried and failed to locate a local expert who had the requisite qualifications. *Ibid.* Petitioner found a local ballistics expert, Nixon; the court approved his retention; and he proceeded to examine the ballistics and toolmark evi-

dence, the purpose for which he was retained. No more was required.

Petitioner argues (Pet. 16) that LaMagna was better suited than Nixon to refute the testimony of one of the government's ballistics experts because he had published on the topic of toolmark analysis on fired bullets, because he was familiar with the FBI's rifling database, and because he was critical of using ballistics data to make unique matches of bullets to guns when the guns are not present. But the government did not argue at trial that there was a unique match between the bullets that killed Brannon and petitioner's missing revolver; rather, it contended only that petitioner's revolver *could* have fired the bullets that killed Brannon, and it affirmatively disclosed that at least 15 other models could have done so as well. See Pet. App. 9a-10a, 12a. Moreover, petitioner does not explain why Nixon was incapable of making the same points that LaMagna would have made, especially with the aid of LaMagna's published work. See *id.* at 12a. Indeed, petitioner does not indicate what LaMagna's testimony would have been, which led the court below to observe that, for all it knew, LaMagna might have agreed with the conclusions of the government's experts. *Ibid.* Although petitioner asserts (Pet. 15) that LaMagna had "*particular qualifications*" making his retention necessary, he does not address *Nixon*'s qualifications, nor does he undermine the district court's fact-bound conclusion that petitioner had failed to establish why LaMagna was uniquely needed for this case.

Petitioner contends that LaMagna's services were "reasonably necessary," as required for *any* funding for experts. But petitioner makes no effort to show that the district court erred in not finding LaMagna's services to

be of "an unusual character or duration," the requirement for an exemption from the $7500 statutory limit for expert services. 18 U.S.C. 3599(g)(2). Nor does petitioner dispute that Congress may place reasonable limits on the amount of money made available for expert services in a single case that does not involve these "unusual" circumstances. As the court of appeals stated, "[n]either the Constitution nor the Criminal Justice Act entitles a defendant to the best (or most expensive) expert," just as a defendant is not entitled to the best (or most expensive) appointed attorney. Pet. App. 12a. Rather, upon showing that particular expert services are "reasonably necessary," a defendant is entitled only to an expert who is competent to provide those services, and petitioner has never argued that Nixon failed to meet that standard. See *ibid.* Such a showing would be necessary to show that retaining Nixon rather than LaMagna prejudiced petitioner's defense.

Petitioner's reliance (Pet. 15) on *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is unavailing. Indeed, the district court in this case conducted a *Daubert* hearing into the expertise of Special Agent Paul Tangren, the witness about whom petitioner now complains, and petitioner had ample opportunity for "[v]igorous cross-examination." Pet. 15-16 (quoting *Daubert*, 509 U.S. at 596).

Accordingly, petitioner has not established that the district court abused its discretion or committed a clear factual error when it found that petitioner had not justified the retention of LaMagna at a rate in excess of the presumptive statutory cap. Nor does petitioner allege any conflict on this issue. Further review therefore is not warranted.

3. Petitioner contends (Pet. 19-23) that the prosecutor improperly commented on petitioner's failure to testify in arguing to the jury during the penalty phase of the trial that petitioner lacked remorse for his crime. Petitioner focuses (Pet. 6-7) on two of the prosecutor's comments: first, "[h]e's sitting 20 feet away from you and there's nothing, no remorse whatsoever, because he thinks he got away with it," Pet. App. 71a; and second, "[H]e's sorry he got caught, but he's not sorry that he shot Joyce Brannon. The only ramification of that as he's sitting opposite you right now, nothing else in this man's heart, not a single thing. He has no remorse for what he did," *id.* at 72a-73a.

a. As a threshold matter, petitioner failed to preserve his *Griffin* claim: although he was represented by learned and experienced counsel, see 18 U.S.C. 3005, 3599(b), petitioner made no objection to the prosecutor's comments. Accordingly, as petitioner acknowledged in the court of appeals (Pet. C.A. Br. 41-42), the applicable standard of review is plain error. See Fed. R. Crim. P. 52(b). As discussed below, the prosecutor's statements did not violate petitioner's rights, but even if they did, petitioner could not establish reversible plain error. Petitioner cannot demonstrate any effect on his substantial rights from a few sentences of closing argument that pertained to only one of five aggravating factors. See *United States* v. *Olano*, 507 U.S. 725, 734-735 (1993). Nor can he show that the prosecutor's comments "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 736 (citation omitted).

b. This Court has indicated that any lawful evidence that tends to show a defendant's lack of remorse is admissible in aggravation in a death penalty case. See

Zant v. *Stephens*, 462 U.S. 862, 886 n.22 (1983). In *Mitchell* v. *United States*, 526 U.S. 314 (1999), the Court held that, at sentencing, a court may not, consistent with the Fifth Amendment privilege, draw an adverse inference from a defendant's silence "in determining the facts of the offense." *Id.* at 330. The Court expressly left open in *Mitchell* the question "[w]hether silence bears upon the determination of a lack of remorse." *Ibid.*

This case does not present the question left open in *Mitchell* because the challenged comments of the prosecutor did not refer to petitioner's silence, *i.e.*, his decision not to testify. As the court of appeals recognized, the gravamen of the prosecutor's argument was not that the jury should infer lack of remorse from petitioner's *silence*, but that it should do so from the evidence of his *affirmative conduct*. Pet. App. 26a-27a. Thus, in his opening and closing statements at the penalty phase, the prosecutor recalled for the jury the evidence that, while in pre-trial detention following his arrest, petitioner had phoned one of his girlfriends and told her that, within a matter of weeks, his troubles with the law would be behind him and he could return to earning a living, 5/10/2005 Tr. 3105; that he continued to commit Medicare fraud by submitting documents in support of a false claim to a carrier who was unaware of his Medicare suspension, Pet. App. 71a; and that he continued to call his patients from jail in an attempt to thwart their cooperation with the authorities (the same motive that led him to murder Joyce Brannon), *id.* at 71a-72a.

In short, the evidence that petitioner looked forward to escaping the consequences of his misdeeds and quickly picking up his life where he had left off was strongly indicative of lack of remorse, as was his continuation of criminal activity from prison following his arrest. After

reviewing the evidence, the district court agreed: it held that the evidence of petitioner's post-arrest conduct provided "more than enough evidence" for the lack-of-remorse aggravator "to go to the jury." 5/18/2005 Tr. 3702. In the words of the court of appeals, "[s]omeone who carries on with crime, even after being caught and imprisoned, can be called remorseless without stretching the term." Pet. App. 27a. Petitioner's decision not to confess, plead guilty, or take the stand to express remorse did not bar the government from showing through his affirmative post-arrest *conduct* that he lacked remorse.

In neither of the comments on which petitioner focuses did the prosecutor advert directly or indirectly to petitioner's failure to testify. The prosecutor's remark about petitioner's "sitting 20 feet away from you" and showing "no remorse whatsoever" was a reference to petitioner's demeanor. Suggesting to the jury that a defendant's courtroom demeanor is reflective of lack of remorse is not tantamount to commenting on the defendant's silence. Jurors naturally take note of a defendant's demeanor in the courtroom, Pet. App. 29a, and there is nothing improper in the prosecutor's asking them to draw an inference from what they observe—a request they are of course free to reject. See *Bates* v. *Lee*, 308 F.3d 411, 421 (4th Cir. 2002) ("[P]rosecutorial comments about the lack of remorse demonstrated by a defendant's demeanor during trial do not violate a defendant's Fifth Amendment [privilege]."), cert. denied, 538 U.S. 1061 (2003); *Six* v. *Delo*, 94 F.3d 469, 476-477 (8th Cir. 1996) (same), cert. denied, 520 U.S. 1255 (1997).

Nor did the prosecutor advert to petitioner's silence in remarking that petitioner was "sorry he got caught" but "not sorry that he shot Joyce Brannon." The re-

mark followed immediately upon the prosecutor's discussion of petitioner's post-arrest conduct. See Pet. App. 71a-73a. In that context, the prosecutor's point was that the jury should infer remorselessness from petitioner's actions, not from his silence.

c. The federal appellate decisions on which petitioner relies (Pet. 21) do not help him. In each of the cases finding a *Griffin* violation at summation, the prosecutor had pointed to the defendant's decision not to testify about the crime, *not* simply to his conduct or to his courtroom demeanor. There is no disagreement among the courts of appeals or state supreme courts concerning the propriety of statements like those the prosecutor made here.

In *Beardslee* v. *Woodford*, 358 F.3d 560 (9th Cir.), cert. denied, 543 U.S. 842 (2004), the prosecutor, in asking the jury to find a lack-of-remorse aggravator, stated as follows: "Since you only heard the defendant through the tape recorder and his previous testimony, you were not able to observe his demeanor and sincerity at the time he testified so you, too, could judge if there was any feeling in the man"; and "Wouldn't you expect a man on trial for his life would, through his statements, cry out for forgiveness, cry out for pity? He did not. Never heard any in the statements." *Id.* at 586. On collateral review, the court of appeals held that the reference to the jury's not being "able to observe" whether "there was any feeling in the man" violated *Griffin*, because it "*went beyond mere demeanor*" and improperly "contrast[ed] the actual trial with a hypothetical one in which the defendant testified." *Id.* at 587 (emphasis added). In the instant case, the prosecutor made no comparable reference to petitioner's decision not to testify; rather,

he asked the jury to infer lack of remorse from petitioner's affirmative conduct and demeanor.

In *Lesko* v. *Lehman*, 925 F.2d 1527 (3d Cir.), cert. denied, 502 U.S. 898 (1991), another capital case, the defendant testified at the penalty phase to present mitigating evidence about his background, but he did not address the merits of the charges. *Id.* at 1540. The prosecutor asked the jury to infer a lack of remorse because the defendant had testified about his own hardships but "didn't even have the common decency to say I'm sorry for what I did." *Ibid.* (citation omitted). The court of appeals concluded, on collateral review, that the comment violated *Griffin* because it constituted a "condemnation" of the defendant's refusal to give particular testimony—self-incriminating testimony. *Id.* at 1544. The court of appeals did not "reach the broad question of whether, and to what extent, a defendant's demeanor is relevant to the sentencing determination in a death penalty case," because the prosecutor's comments were not "a simple reference to demeanor." *Ibid.* Here, by contrast, the prosecutor did not comment on testimony or the failure to testify.

The remaining federal appellate decisions cited by petitioner involved errors by the *court* in *non-capital* sentencing proceedings, not improper comments in summation. In *Ketchings* v. *Jackson*, 365 F.3d 509 (2004), the Sixth Circuit held, on collateral review, that the trial judge had increased the defendant's sentence *not* based on his lack of "remorsefulness," but based on his refusal to admit guilt in allocution at the sentencing hearing. *Id.* at 514. Based on that *factual* conclusion (on which it disagreed with the state court), the court of appeals found *Griffin* error. In *United States* v. *Mezas de Jesus*, 217 F.3d 638 (9th Cir. 2000), the court of appeals

held that the sentencing judge had misapplied the burden of proving a Sentencing Guidelines enhancement for an uncharged kidnapping, in part because the court had remarked on the defendant's failure to offer any evidence to counter the government's proof, "like, for instance, a statement under oath from [the defendant] that [the kidnapping] didn't happen." *Id.* at 644 (citation omitted); see *id.* at 644-645. Finally, in *United States* v. *Rivera*, 201 F.3d 99 (2d Cir. 1999), cert. denied, 531 U.S. 901 (2000), the court of appeals held that the district court erred in increasing the defendant's sentence "quite explicitly * * * for his refusal to cooperate with the authorities following his conviction," rather than for a callous lack of concern about the injuries his crimes had inflicted on others. *Id.* at 102. None of those cases addressed the question of when prosecutorial comment to a jury concerning a defendant's lack of remorse crosses the line into *Griffin* error.[3]

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[3] Petitioner also is not aided by the three district court decisions on which he relies (Pet. 21), which in any event are not precedential and would not establish a conflict warranting review by this Court. In *United States* v. *Roman*, 371 F. Supp. 2d 36 (D.P.R. 2005), the court held that the government could not base the lack-of-remorse aggravator based on information that would encroach on a defendant's Fifth Amendment privilege, but that it could rely on evidence that the defendant's "affirmative conduct" reflected continuing remorselessness. *Id.* at 50-51. In *United States* v. *Cooper*, 91 F. Supp. 2d 90 (D.D.C. 2000), the court held that the aggravating factor of future dangerousness could be proved by evidence of "lack of remorse * * * that does not encroach on the defendant's right to remain silent," potentially including evidence that the defendant committed crimes after being arrested or convicted or that he made statements showing pride in his criminality. *Id.* at 113; see *id.* at 112. The court excluded, however, evidence of the defendant's failure to acknowledge his guilt in a post-arrest statement. *Id.* at 112-113. Finally, in *United States* v. *Davis*, 912 F. Supp. 938 (E.D. La. 1996), the court stated that the allegation of lack of re-

Nor is petitioner helped by the state cases he cites (Pet. 22). In the sole capital case, the court found *no* error in the prosecutor's reference to the defendant's lack of remorse because, as in the instant case, the prosecutor did not allude to the defendant's own failure to testify. *People* v. *Ervin*, 990 P.2d 506, 537 (Cal.), cert. denied, 531 U.S. 842 (2000). The remaining cases, all non-capital, merely stand for the proposition that, where a defendant has maintained his innocence throughout the proceedings, his sentence may not, consistent with his Fifth Amendment privilege, be based on his mere failure to express remorse at sentencing or at trial. See *State* v. *Shreves*, 60 P.3d 991, 996 (Mont. 2002); *Brake* v. *State*, 939 P.2d 1029, 1033 (Nev. 1997) (per curiam); *People* v. *Yennior*, 282 N.W.2d 920 (Mich. 1977) (three-sentence summary reversal); *People* v. *Young*, 987 P.2d 889, 894-895 (Colo. Ct. App. 1999); *State* v. *Hardwick*, 905 P.2d 1384, 1391 (Ariz. Ct. App. 1995); *State* v. *Williams*, 389 S.E.2d 830, 833-834 (N.C. Ct. App. 1990); cf. *State* v. *Burgess*, 943 A.2d 727, 732, 736 (N.H. 2008) (applying the state constitution).[4] But, as demonstrated above, in this case the prosecutor asked the jury to infer lack of remorse from factors other than petitioner's silence.

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morse "encroaches dangerously" on an offender's Fifth Amendment privilege, but it left open the possibility that a defendant's "affirmative words or conduct" indicating lack of remorse may be admissible. *Id.* at 946.

[4] In *Burgess*, the defendant had *not* maintained his innocence, but had confessed to the acts underlying his convictions while denying any criminal intent. The state supreme court therefore concluded that the defendant could have expressed remorse for the acts without further incriminating himself, and that his failure to do so was properly taken into account. 943 A.2d at 739. Contra *Brake*, 939 P.2d at 1033. That fact pattern is not present here.

None of the cited state cases suggests that prosecutorial comment of the sort at issue here violates the Fifth Amendment privilege. To the contrary, two of the cases make clear that lack of remorse is a valid sentencing factor when supported by evidence *other* than the defendant's silence. See *Burgess*, 943 A.2d at 738; *Shreves*, 60 P.3d at 996.

d. Even if the prosecutor's comments were somehow improper, there would still be no basis for further review by this Court. As the court below correctly concluded, any error in permitting the comments did not prejudicially affect the jury's sentencing decision. Pet. App. 29a. Petitioner does not take issue with the court of appeals' conclusion that any error was harmless or assert that the harmless-error finding involved some legal principle that would warrant this Court's review.

This Court has held that, on appeal from a federal death sentence, an error concerning an aggravating factor is harmless if the reviewing court is convinced that the jury would have returned the same verdict had the invalid aggravating factor not been submitted to the jury or had the invalid factor been precisely defined. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 402 (1999). The court of appeals properly applied that standard here. As the court explained:

> Take away those few pages of transcript, and the weight of evidence remains. Four aggravating factors or considerations are solid. The facts of this cold-blooded execution of a potential witness dominate. Prosecutorial comments about [petitioner's] demeanor in court and lack of visible remorse strike us, and likely struck the jurors, as gilding the lily.

Pet. App. 29a.

Indeed, the affirmative evidence of lack of remorse (independent of the prosecutor's comments) made that aggravating factor just as "solid" as the court of appeals found the other four aggravating factors to be, Pet. App. 29a. To the extent that the challenged comments referred to petitioner's silence at all, they were brief and indirect. As such, they could not have materially affected the result, especially given the evidence of petitioner's post-arrest conduct and statements that clearly established his lack of remorse. See *Beardslee*, 358 F.3d at 587 (holding that the prosecutor's penalty-phase comments about lack of remorse were harmless because they were not "extensive" and did not "stress" the equation of silence with remorselessness); *Six*, 94 F.3d at 477 (holding that any error in the prosecutor's penalty-phase comments regarding the lack-of-remorse aggravator "were not egregious or pervasive enough to render the result of the penalty phase unreliable").[5]

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[5] Judge Posner thought it "uncertain" whether removing *both* the lack-of-remorse factor *and* the vulnerable-victim factor from the jury's consideration would have affected the sentence. Pet. App. 39a. But petitioner does not advance in this Court Judge Posner's contention that the government failed to establish the vulnerable-victim factor. Nor does the dissent establish that any error in the closing argument about the lack-of-remorse factor was prejudicial. Judge Posner did not acknowledge the affirmative evidence of petitioner's lack of remorse, see *id.* at 30a-31a, and his statement that the lack-of-remorse factor occupied "the bulk of [the prosecutor's] closing argument," *id.* at 34a, is incorrect. See 5/18/2005 Tr. 3710-3718 (discussing all five aggravating factors). As for the law review articles that Judge Posner cited (and which petitioner cites for the distinct proposition that this case is an important one, Pet. 22 n.5), they simply support the proposition that lack of remorse can, in the abstract, be a weighty consideration. Indeed, one of the articles focuses on jurors' beliefs about the defendant's lack of remorse even when the State did *not* affirmatively argue that the lack of remorse was an aggravating factor. See Theodore Eisen-

Moreover, under the applicable plain-error standard, it is *petitioner's* burden to show that the error was not harmless, as well as that it "seriously affect[ed] the fairness, integrity or public reputation" of the proceedings. See p. 16, *supra*. Petitioner undertakes no effort to carry that burden in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2009

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berg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1607-1608 (1998).

(3)

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IN THE

Supreme Court of the United States

RONALD MIKOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. The Government's Response Illustrates Why This Court Should Specify The Standard For Determining Whether A Prosecutor's Comments Have Violated A Defendant's Fifth Amendment Right Not To Testify.

The Government attempts to avoid the first Question Presented by disassembling its closing argument to minimize the impact of its statements concerning Mikos's decision not to testify. This attempt must fail. In fact, the prosecutor specifically argued to the jury that Mikos "doesn't have to say a word. He does not have to tell you where that gun is. But this is not a game of hide-and-go-seek." (Pet. App. G, 66a.) These words repeatedly focus the jury's attention squarely on the fact that Mikos did not testify. Twice the prosecutor pointed out specifically that Mikos did not "say" or "tell" the jury something; this argument simply does not focus on conduct, as the Government suggests. The prosecutor's next sentence mentions the "game of hide-and-go-seek," a game in which a person hides *himself* – not an object – from another. The plain thrust of this comment, too, is that Mikos is hiding from the jury rather than testifying to it.[1] Surely the

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[1] Significantly, the court below concluded that this hide-and-go-seek argument represented the prosecutor's "efforts to hold [Mikos's] *conduct* against him" only after *omitting* from its description of the argument the two preceding sentences, *i.e.*, that Mikos "doesn't have to say a word. He does not have to tell you where that gun is." (*Compare* Pet. App. A, 7a (court's emphasis), *with* Pet. App. G, 66a.)

prosecutor could have argued that Mikos hid a gun many ways without highlighting his courtroom silence.

Turning to the law, the Government inadvertently but powerfully demonstrates the need for this Court's guidance. It acknowledges that in *United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir.), *cert. denied*, 519 U.S. 942 (1996), the Seventh Circuit propounded "a test for applying the *Griffin* [*v. California*, 380 U.S. 609 (1965)] rule that the Seventh Circuit has employed in some other cases." (Opp. 12.) Yet the Government immediately admits that "whatever the merit of the test, the court below did not invoke it or rely on any decision that did so." (*Id.*) That is emblematic of the disarray in the law applying *Griffin*, and therefore precisely the point: the court below did not apply its own test, or for that matter, any discernible test, in evaluating the constitutionality of the prosecutor's argument. Nor did the court (or the Government) offer a simple word of explanation as to why the court ignored *Cotnam* in a capital case with Mikos's life on the line. (*See* Pet. App. A, 7a.)

The court's fleeting discussion of the *Griffin* issue described the argument as the prosecutor's "efforts to hold [Mikos's] conduct against him." (*Id.* (emphasis omitted).) This reasoning may be an attempt to assess the prosecutor's intent in making the argument, which is the first part of *Cotnam*'s two-part test. But the court below never addressed the second, far more significant part of the *Cotnam* test: the impact of the prosecutor's argument on the jurors deciding whether Mikos was guilty. 88 F.3d at

497. Indeed, the court below never discussed how the jury would understand the prosecutor's statement that Mikos "doesn't have to say a word. He does not have to tell you where the gun is." (*See* Pet. App. A, 6a-7a.)

Nowhere does the Government contend that any court anywhere has devised an adequate test for assessing whether a prosecutor's statement violates *Griffin* and the Fifth Amendment.[2] The Government uses the fact that the court below did not even apply its own test under *Cotnam* to dodge not only the blatant inadequacies of that test, but also the disarrayed state of the law under *Griffin*. The unprincipled, standardless decision below reflects this disarray, though, and while it provides less protection for Fifth Amendment rights than *Cotnam*, even *Cotnam* is fatally flawed. First, *Cotnam* does not address how the two parts of its test interact, or what to do if they point in different directions. Second, *Cotnam* condemns only statements that the jury would "*necessarily* take ... to be a comment on the defendant's silence." 88 F.3d at 497 (emphasis added). This unduly lax standard means that many statements that juries could and do take as comments on defendants' silence will work their unconstitutional harm and yet escape remedy.

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[2] In a footnote the Government observes that *Portuondo v. Agard*, 529 U.S. 61 (2000), *United States v. Hasting*, 461 U.S. 499 (1983), and *Baxter v. Palmigiano*, 425 U.S. 308 (1976) "do not address the issue relevant here." (Opp. 12 n.2.) This is correct. Although these cases do discuss the outlines of the *Griffin* rule, none sets a standard for evaluating whether a particular statement violates that rule. That, again, is precisely why review is appropriate here.

Finally, the Government simply ignores Mikos's proposal that "an appropriate test – in keeping with this Court's jurisprudence – would ask whether there is a 'reasonable probability' that the jury understood a prosecutor's statement to refer to the defendant's silence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995)." (Pet. 13.) The Government's silence on this point speaks volumes – just as the prosecutor's repeated reference to Mikos's silence on the topic of the gun spoke unconstitutional volumes to the jury.

The Court should grant certiorari to devise a test that will enforce the *Griffin* ban on prosecutorial argument regarding defendants' exercise of their Fifth Amendment rights not to testify.

II. The Government's Response Demonstrates The Need For This Court To Articulate The Standards Applicable To The Appointment Of Experts To Defend An Indigent Defendant In A Capital Case.

The Government has sidestepped the second Question Presented: whether courts in capital cases have a heightened obligation under 18 U.S.C. § 3599 or the Due Process Clause to ensure that an indigent defendant has the assistance of an expert with the particular expertise that appointed counsel reasonably has requested and needs to defend the case. The Government does not point to any precedent from this Court – or any court – addressing the standards applicable to this issue. Nor does it dispute Mikos's contention, preserved below, that, in violation of due process, the

Government's FBI agent-expert provided the jury with a junk science conclusion that Mikos's missing gun could have fired the bullets found in the victim. This Court's recent ruling in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009) that scientific and forensic analyses are not inherently "neutral," "reliable," or "immune from the risk of manipulation" demonstrates the importance of this Question in capital cases.

The Government speculates – without any record support – that LaMagna and Nixon were equally capable of defending Mikos's interests against the Government's superior resources. The attorneys the district court appointed to represent Mikos in this capital case reached the contrary conclusion and so informed the court on the record. (10Tr.2117-18.) The Government relied heavily on the FBI's GRC database to establish that Mikos's gun *could have* fired the bullets recovered at the scene. (Pet. 15-17.) LaMagna, not Nixon, had the particularized knowledge and experience to analyze and rebut this seriously flawed conclusion; LaMagna, not Nixon, had published on the very topic at issue concerning analyzing toolmarks on fired bullets; LaMagna, not Nixon, was familiar with and critical of the FBI's database; LaMagna, not Nixon, has gone on record attacking this type of ballistics and toolmarks analysis as junk science – and earned a citation in the National Academy of Sciences publication for it. (Pet. 15-16 & n.4); *see Melendez-Diaz*, 129 S. Ct. 2536 (noting the National Academy's discussion of "problems of subjectivity, bias, and unreliability of common forensic tests such as ...

toolmark and firearms analysis"). An expert may have stellar credentials and be perfectly competent to testify about certain subjects in a broad field, but that expert still must possess the *precise* expertise to counter a Government expert. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

The Government and the court below argue that Mikos did not make an offer of proof as to how LaMagna would have testified. (Opp. 14; Pet. App. A, 12a.) They demand the impossible: Mikos could not make such an offer of proof because he was not allowed to retain LaMagna. (Pet. 16-17.) But LaMagna's publication made plain his view that Agent Tangren's testimony was not science at all, and that should suffice.

Moreover, the Government's assertion that the district court appropriately denied Mikos's request for LaMagna because his costs would have exceeded the presumptive $7,500 limit on expert funds misses the point. (Opp. 13-15.) The $7,500 limit is presumptive only and may be exceeded. The real standard by which the court's refusal to pay LaMagna's travel expenses should be measured is provided by Section 3599 and due process, which require some leveling of the playing field. *See Ake*, 470 U.S. at 76-77; *cf. Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993). Here, the district court's refusal to approve funds for LaMagna because he lived in Massachusetts – when the Government brought in not one but *three* East Coast experts to address gun-related issues – was exceedingly arbitrary and unfair. Properly interpreted, Section 3599 and due process should not

permit a conviction in a capital case to stand where the defense is placed at such an insurmountable disadvantage. This Court should grant certiorari to answer the second Question Presented.

III. This Court Should Grant Certiorari To Address The Issue Specifically Left Open In *Mitchell v. United States* – Whether The Fifth Amendment Prohibits Using A Defendant's Silence To Prove The Aggravating Factor Of Lack Of Remorse.

This case squarely presents the issue this Court left open in *Mitchell v. United States*, 526 U.S. 314, 330 (1999): "[w]hether silence bears upon the determination of a lack of remorse" as a sentence-enhancing factor. By answering that question with an unqualified "yes" – indeed, by approving the argument that Mikos "showed no remorse" merely because he never took the stand to apologize – the court below has virtually eliminated the Fifth Amendment's protections from capital sentencing. (Pet. App. A, 26a.) Indeed, the court's decision gives unrestricted license to the Government to argue the lack of remorse aggravating factor in *any* case where the defendant does not tell the jury he is sorry. This Court should address *Mitchell*'s open issue now to reaffirm that the Fifth Amendment does not stop protecting a defendant at the very stage when he needs it most – when a jury is deciding whether he should live or die.

The Government recognizes the sweeping nature of the flawed holding below and implicitly concedes that penalty-phase argument calling

attention to Mikos's silence would violate the Fifth Amendment. (Opp. 17-19.) Nonetheless, it seeks to excuse the prosecutor's argument by asserting that it addressed Mikos's "affirmative conduct" or in-court "demeanor," not his silence. (*Id.* (emphasis omitted).) But *everything* on which the Government relies to demonstrate Mikos's supposed unremorseful "affirmative conduct" concerns the Medicare fraud, *not* the murder. As the dissent below recognized, conduct relating to the *fraud* cannot establish lack of remorse *as to the murder*. (Pet. App. A, 34a.)

The Government's in-court demeanor argument also fails. The Government does not even attempt to argue (it has no basis to do so) that Mikos's demeanor was anything out of the ordinary for a defendant who chose not to testify yet to be present to assist in his defense. That destroys any distinction – assuming there is one – between Mikos's "demeanor" and his "silence." "The non-reaction the government [claims as] 'demeanor' evidence is not an action or a physical response, but a failure to speak." *United States v. Velarde-Gomez*, 269 F.3d 1023, 1031 (9th Cir. 2001) (en banc). "Whether the government argues that a defendant remained silent or describes the defendant's state of silence, the practical effect is the same – the defendant's right to remain silent is used against him at trial." *Id.* at 1032.

Again, there is simply no question that the prosecutor here directly and specifically asked the jury to infer from Mikos's silence that he had no remorse for the murder, and told the jurors that they could use that silence as a reason to sentence Mikos

to death: "He's sitting 20 feet away from you and there's nothing, no remorse whatsoever .... [H]e's sorry he got caught, but he's not sorry that he shot Joyce Brannon. The only ramification of that as he's sitting opposite you right now, nothing else in this man's heart, not a single thing. He has no remorse for what he did." (Pet. App. H, 71a-73a.) The natural, common-sense, and "only inference" jurors could draw from this argument was that if Mikos were sorry for the murder, he would have taken the stand and said so, not stayed silent sitting 20 feet away from them. (Pet. App. A, 35a.)

The Government also misreads *Beardslee v. Woodford*, 358 F.3d 560 (9th Cir.), *cert. denied*, 543 U.S. 842 (2004) and *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir.), *cert. denied*, 502 U.S. 898 (1991) (both cited Opp. 19-20; Pet. 21). In *Beardslee*, the court of appeals held that the prosecutor's penalty-phase "reference to the jury not being 'able to observe' whether 'there was any feeling in the man' contrast[ed] the actual trial with a hypothetical one in which the defendant testified" and therefore violated the Fifth Amendment. 358 F.3d at 586-87. Because the *Beardslee* defendant had offered some testimony, however, albeit through prior statements, the prosecutor *could* comment to some extent on the defendant's demeanor *while testifying*. *See id.* By going beyond only that and affirmatively inviting the jury to penalize the defendant for not testifying in front of them – as Mikos's prosecutor did here – the *Beardslee* prosecutor violated the Fifth Amendment. Similarly, in *Lesko*, 925 F.2d at 1544-47, the court of appeals reversed a defendant's death sentence, on

habeas corpus review, after holding that the prosecutor violated the Fifth Amendment by arguing that the jury should penalize the defendant for failing to say he was sorry when he provided other sentencing-phase testimony. Both of these cases prove Mikos's point: if silence-related argument violates the Fifth Amendment when the defendant has provided some testimony, then certainly similar argument when a defendant (like Mikos) does *not* testify *at all* must also violate the Fifth Amendment.

In addressing the other cases Mikos cited to demonstrate the need for this Court's review, the Government fails to show any uniformity or coherence among the courts on using silence to prove the lack of remorse aggravating factor. Rather, the Government merely establishes that lower courts do require guidance on *Mitchell*'s open issue – particularly in cases where the defendant, like Mikos, decides to remain silent throughout the proceedings. Indeed, the Government cites no case establishing a test for deciding when argument on the lack of remorse factor may violate the Fifth Amendment.

The Government also dismisses Mikos's citation to a number of other federal appellate decisions, claiming that none of them "address[] the question of when prosecutorial comment to a jury concerning a defendant's lack of remorse crosses the line into *Griffin* error." (Opp. 21.) Here, the Government seeks to narrow Mikos's third Question Presented to focus on improper prosecutorial argument. But this Question Presented (and the issue left open in *Mitchell*) is broader: the issue is whether a

defendant's silence can be used, in *any* way – including but not limited to prosecutorial argument – to show the lack of remorse aggravating factor. That the court, rather than the Government, committed the constitutional error in some of the cases Mikos cites does not diminish the existence of varying views on the evidentiary value – or lack thereof – of silence to prove lack of remorse.

Furthermore, in giving short shrift to Mikos's state cases (which also demonstrate diverging views on *Mitchell*'s open issue), the Government once again proves Mikos's point. The Government argues that Mikos's cases "merely stand for the proposition that, where a defendant has maintained his innocence throughout the proceedings, his sentence may not, consistent with his Fifth Amendment privilege, be based on his mere failure to express remorse at sentencing or at trial." (Opp. 22.) Mikos agrees. A defendant's mere failure *to express* remorse should never be used to demonstrate *a lack* of remorse and to justify imposing the death penalty – but that is exactly what happened here, with the lower court's approval.

Finally, the Government incorrectly contends that Mikos "does not take issue with" the holding below that the prosecutor's unconstitutional argument was mere "harmless error." (Opp. 23.) Mikos vigorously contests that conclusion; he seeks this Court's review precisely because the unconstitutional use of his silence against him significantly influenced the jury's decision to impose a death sentence. Without Mikos's silence, jurors could not have found lack of remorse beyond a

reasonable doubt, as the dissent below recognized. (*Id.* at 30a-31a, 38a-40a.) Nor did the weighing of aggravating and mitigating factors clearly favor death; jurors credited numerous mitigating circumstances. By inviting jurors to penalize Mikos for his silence, the Government unconstitutionally tipped the balance toward death. Given the "acute need for reliable decisionmaking when the death penalty is at issue," *Deck v. Missouri*, 544 U.S. 622, 632 (2005), the bare speculation of the Government and the court below that the lack of remorse factor did not affect the sentence is utterly insufficient.

The Government has bolstered Mikos's argument that this Court's review is necessary to get the court below – and those other state and federal courts that have allowed prosecutors or courts to use silence to establish lack of remorse – back in line with *Griffin* and the Fifth Amendment. A defendant's silence simply has no bearing on the lack of remorse inquiry, and it violates the Fifth Amendment most fundamentally to use that silence to justify the imposition of the harshest possible sentence under the law. In *Mitchell*, this Court left this issue to another day; after ten years, the day to resolve this issue has come, and this is the case.

CONCLUSION

This Court should grant Mikos's Petition for Writ of Certiorari.

Dated: September 1, 2009 Respectfully submitted,

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